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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES L. DRURY, DRURY INDUSTRIES, INC., THE MAY DEPARTMENT STORES COMPANY, WEST PARK ASSOCIATES, MAY CENTERS OF CAPE, INC., MAY CENTERS, INC., and the CITY OF CAPE GIRARDEAU, MISSOURI,

Petitioners,

v.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR., and WESTBOROUGH MALL ASSOCIATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. May an inference of conspiracy, sufficient to avoid summary judgment, be drawn from unidentified, unauthenticated hearsay documents which, even liberally construed, show nothing more than the mere opportunity to conspire?

2. Did the Court of Appeals properly reject petitioners' reliance on the First Amendment and the *Noerr-Pennington* doctrine on the basis that petitioners "may not be protected by *Noerr* because their legitimate lobbying efforts may have been accomplished by illegal or fraudulent actions" which were never pleaded, identified or proven?

3. Did the City Manager's changing of the city zoning map and statement of his inaccurate opinion that respondents had lost their commercial zoning deprive them of a constitutionally protected property interest or deprive them of any interest without due process of law under *Parratt* v. *Taylor,* 451 U.S. 527 (1981), or *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1 (1979)?

STATEMENT OF INTERESTED PARTIES

As indicated in a letter filed with the Clerk of the Court, certain defendants below have not been listed as parties because petitioners believe that they are not interested in the outcome of the petition. Pursuant to that belief, there are no interested parties who are not identified in the caption.

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To the United States
Court of Appeals for the Eighth Circuit

Charles L. Drury, Drury Industries, Inc., The May Department Stores Company, West Park Associates, May Centers of Cape, Inc., May Centers, Inc., and the City of Cape Girardeau, Missouri, defendants in the action below, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed on November 12, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, filed on November 12, 1982, is reproduced in Appendix A. As modified on denial of rehearing, it is reported at 693 F.2d 733. The Memorandum and Order of the United States District Court for the Eastern District of Missouri is reported at 532 F. Supp. 284 and is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1982, and a timely petition for rehearing was denied on January 17, 1983. Copies of the judgment and the order modifying one footnote in the initial opinion and denying rehearing are reproduced in Appendix C. This petition was filed within 90 days of January 17, 1983. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

This case involves the proper application of the principles of conspiracy law and the evidentiary requirements of Federal Rule of Civil Procedure 56(e) in connection with material submitted in opposition to a motion for summary judgment made by defendants charged with violating 15 U.S.C. §§ 1 & 2 and 42 U.S.C. § 1983. This case also involves the construction and application of the First Amendment to the United States Constitution and the aforesaid statutes in light of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) ("*Noerr*"), *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965) ("*Pennington*"), and *Parratt* v. *Taylor*, 451 U.S. 527 (1981). The text of the pertinent parts of the applicable constitutional and statutory provisions and rule are reproduced in Appendix D.

STATEMENT OF THE CASE

As perceived by the Court of Appeals, this is basically a one-issue case: Was there sufficient circumstantial evidence to withstand a motion for summary judgment on the question of whether private parties involved in various ways in the development of the West Park shopping mall conspired or agreed with officials of the City of Cape Girardeau, Missouri, that the City would stop respondents' competing mall proposal by casting

doubt upon the status of its zoning long enough to allow the West Park developers to secure tenants and obtain a head start on construction? App. A at pp. A-16-A-17.[1] This single issue, however, has spawned several important questions that have been answered by the Eighth Circuit in such a way as to create turmoil and uncertainty in the administration of the nation's antitrust and civil rights laws. In order to address these questions and the far-reaching errors in the conclusions of the Court of Appeals, it is necessary to sketch the factual background of the development of the two rival shopping malls.

The History of "Westborough Mall"

In 1974, C-4 zoning for the site of plaintiffs' proposed shopping center was approved by the Cape Girardeau City Council for the purpose of constructing a shopping mall containing three major department stores (as anchor tenants) and a number of small specialty shops (App. B at p. A-28). Sporadic leasing attempts were made and rosy predictions were announced to prospective tenants that Westborough Mall would begin construction (giving a series of progressively delayed proposed opening dates). But as of May 1979, nothing had been accomplished; construction of Westborough Mall by the respondents in this case had progressed no further than the preliminary planning stage, and the project was at a standstill.

By May 1979, George Staples had incurred debts of approximately $600,000 and had no funds with which to pay either his bank or his contractor (App. B at p. A-29).[2] No anchor tenants

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[1] In this Petition, the petitioners other than the City of Cape Girardeau will be identified collectively as the "West Park developers."

[2] George Staples, Jr., is the principal plaintiff, together with a company which he manages, Westborough Mall, Inc., and a partnership for which he acts as general partner, Westborough Mall Associates.

had agreed to lease space, and no leases with *any* tenant had been executed (App. B at p. A-29). Moreover, respondents' general contractor testified that he would not permit any construction work to commence until Staples paid the bill of more than $300,000 for grading on the site (App. B at p. A-33). He further testified that he would have needed final working plans and would have had to place orders for needed construction materials at least three months in advance to permit construction to begin on May 1. *But no plans had ever been prepared, and no materials had been ordered (Id.).*

Similarly, no financing for Westborough Mall had been obtained or was seriously being sought. No applications for mall financing were ever filed on respondents' behalf, nor could any such applications have been prepared until anchor tenants and other small tenants were secured (App. B at p. A-33).

Based on these undisputed material facts in the record, the district court correctly observed:

> "In sum, by mid-1979, Westborough Mall had no liquid assets, no major department store tenants, no building plans, no commitments for financing, and had [passed] numerous projected target dates promised by Staples throughout the years. In 1979, Westborough Mall was no closer to viability than it was in 1973." App. B at pp. A-29-A-30.

The History of West Park Mall

West Park Mall, constructed by the West Park developers, is located about one mile west of the site of the stillborn Westborough Mall project (App. B at pp. A-31, A-40). The developers decided in 1979 to apply for C-2 zoning for the West Park site to permit grading work to begin and to test the waters concerning the City's attitude about commercial zoning for the

site.[3] They represented to the City Council at the hearing on their C-2 application that they would reapply for C-4 zoning as promptly as possible after the plans for the center had become final (App. B at p. A-31).

The request for zoning was vigorously opposed by Staples and some of his partners at two public hearings, and several of the partners made personal contacts with City Council members to urge rejection of the proposal. The application, however, was approved (App. B at pp. A-31-A-32).

A few months later, the developers prepared and filed an application for C-4 zoning, as they had indicated they would. After another set of public hearings, the West Park Mall site received C-4 zoning. The mall opened in April 1981 and is now in operation (*Id.*).

The public officials who approved the West Park zoning had and have no ties or connections to the West Park developers. Respondents took extensive depositions of each council member and the City Manager, during which there was not even a hint of any improper activity. Indeed, not even respondents went so far as to suggest that the Councilmen acted out of selfish motives—there are no allegations of bribes or payoffs or any economic gain. The undisputed testimony of each city official was that he believed that a major shopping mall developed by competent professionals would be in the best interests of the City of Cape Girardeau and its citizens. Accordingly, the Council approved the application for the West Park zoning, as it had previously granted such zoning to Staples and the Westborough Mall group.

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[3] One of the developers had secured an opinion in 1974 that at least the first phases of a shopping center could be constructed on C-2 zoning (App. B at p. A-31). A C-2 zoning application did not require that the final plans for the center be submitted, and at the time it was filed, the West Park developers had not finalized the layout of the center sufficiently to prepare an application for C-4 zoning (*Id.*).

C. The So-called "Reverter"

In April 1979, the City Manager of Cape Girardeau, W. G. Lawley, received an inquiry from the City Engineer as to whether Westborough Mall retained its C-4 classification despite the lack of construction on the site. After considering the matter, Lawley instructed the City Engineer to change the zoning map to indicate that the C-4 zoning for the Westborough site had expired (App. B at p. A-30), and he reported to the City Council in an open meeting that he had reached this opinion based on his interpretation of a provision of the City Ordinance.[4]

Without regard to the correctness of Lawley's opinion on this subject, the undisputed evidence of record established that these actions were taken without the knowledge of any of the West Park developers and that there was no prior agreement or understanding of any sort that this activity would be conducted (App. A at p. A-17; App. B at pp. A-30, A-32). Indeed, Lawley testified unequivocally at his deposition that he had no discussions of any type with any of the West Park developers before forming his opinion concerning the "reverter."[5]

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[4] It is beyond disputation that Westborough Mall has continually been zoned C-4 and that no "reverter" occurred, because the property had been accorded an exemption from the normal reverter provisions of the City Zoning Code by the City Council (*see* App. A at p. A-3). No ordinance or any other action by the City Council ever changed Westborough Mall's zoning or suggested that it had "reverted." Lawley merely expressed his erroneous personal opinion in response to a question. Indeed, in 1980 the Council reaffirmed that Westborough Mall had always retained its C-4 zoning (App. A at pp. A-10-A-11).

[5] The Court of Appeals held that a sinister inference of conspiracy could be based on the fact that Lawley's actions came only two days after the City Council enacted the ordinance that allowed the West Park Mall developers to begin construction. App. A at pp. A-17, A-19. This "inference" is both untenable and at odds with the record.

In June 1979, Lawley responded to letters from respondents' financial consultant by saying that "it is also the staff opinion that the Westborough Mall site no longer carries a C-4 zoning classification," but he advised that "[y]ou may wish your legal staff to review the contents of the Ordinance in consideration of the facts available in the loan file to satisfy yourself on the validity of the above opinion."

There is no evidence that any of these events had any effect on Westborough Mall. The Court of Appeals apparently realized that respondents never doubted that they retained C-4 zoning (App. A at p. A-11). Certainly Staples *never* took the alleged "reverter" seriously. On April 19, 1979, Staples wrote to his contractor, with a copy of the letter to his banker, reporting that he had consulted with his lawyer and had been reassured that Lawley's opinion was inaccurate and that Westborough retained its C-4 zoning:

> "*We were assured by [attorney] Jeffrey Vaughan that we presently have C-4 zoning and we should not concern ourselves with the same and should proceed with our development as if the matter had not come up.*"

He also assured his financing consultant that he retained C-4 zoning.[6] Staples never brought the matter to the City Council or sought any relief from what he *now* claims were the disastrous effects of Lawley's opinion (App. B at p. A-30). Yet, although other allegations of injury were made in the three revisions to Staples' Complaint, the *sole* cause of injury now alleged is that the "reverter" caused the Westborough project to fail.

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[6] The letter from Lawley to the consultant had nothing to do with Westborough's failure to secure financing. The consultant testified that financing would be available *only if* certain documents (including written commitments by anchor tenants to enter the mall) were available. As noted, these documents never existed. Moreover, the consultant remained willing to help after the Lawley letter if Staples would clarify the zoning, but he soon left the mortgage brokerage business for his own reasons and had no continued involvement in the industry or with Staples.

THE BASIS OF FEDERAL JURISDICTION

The jurisdiction of the district court was based on 28 U.S.C. §§ 1331, 1337 and 1343.

REASONS FOR GRANTING THE WRIT

The Court of Appeals misapplied the well-established standard of proof for the existence of a conspiracy under both the civil rights and antitrust laws. This misapplication was aggravated by the court's disregard for the rules of evidence and Federal Rule of Civil Procedure 56. The result abrogates Rule 56(e) and permits a litigant to avoid a motion for summary judgment by demonstrating no more than an opportunity to conspire.

The Court of Appeals also misapprehended and misapplied this Court's cases conferring legal protection to private parties for their efforts to influence government action. The decision below creates an exception to *Noerr-Pennington* so massive and so easily invoked that the entire doctrine has been effectively scuttled.

This decision raises important questions of law with implications for all local governments and all private persons who deal with those governments. The opinion of the Eighth Circuit jeopardizes the orderly conduct of local government in connection with all zoning matters. It basically prevents any businessman from meeting with local government officials to explain his interests, to seek government action of any type, or to complain about previous government conduct.

1. The Conspiracy Standard Applied by the Court of Appeals Is Inconsistent with Prior Decisions of This Court and Renders Conspiracy Claims Immune from Summary Disposition.

The Court of Appeals concluded that there was a material issue of fact in dispute solely because it believed that there was sufficient evidence to permit an inference of a conspiracy to interfere with respondents' zoning. This decision is inconsistent with the correct standard, announced by this Court in *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946), which requires a plaintiff to submit competent evidence from which a trier of fact could reasonably infer that the defendants had "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *See also Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 152 (1970) (requiring an "understanding" between private persons and public officials to establish a conspiracy or private liability under § 1983). And in *First National Bank* v. *Cities Service Co.,* 391 U.S. 253, 290 (1968), the Court rejected the very rationale employed here by the Eighth Circuit:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

In disregard of the need for proof of a "meeting of the minds," the Court of Appeals concluded that a jury question is created in antitrust and civil rights conspiracy cases merely because the parties *might* have discussed the matter, even though all the evidence of record demonstrated that they did *not* do so. This is plainly the import of the court's opinion when it states:

> "The circumstantial evidence of such an illegal agreement consists of the close relationship between defendant Drury and city officials, the defendants' concern about the progress of plaintiffs' competing site, Drury's notes to 'stop

> them from building so maybe we get a chance to build,' and the timing of the reverter of plaintiffs' C-4 zoning only two days after the city council enacted an ordinance that allowed the West Park Mall developers to begin construction." App. A at p. A-17.

This decision effectively renders conspiracy claims immune from summary judgment or any other form of disposition short of a plenary trial.

There is no evidence of any type that the defendants even discussed Westborough Mall's zoning, much less that they had agreed among themselves to cause it to "revert." In fact, the record contains an uncontroverted affidavit that none of the West Park developers knew anything about Lawley's actions until after they were reported in the press. Nevertheless, the Eighth Circuit: (a) Inferred from "circumstantial" evidence that the City officials gave the West Park proposal special zoning treatment; (b) conjured up an unsubstantiated inference that the defendants discussed the subject of *respondents'* zoning; and (c) then leaped to the unsupportable (and untrue) inference that an illegal *agreement* was reached to interfere with respondents' zoning. This syllogism is particularly defective because it is undisputed that the public officials had no economic or other selfish interest in supporting the West Park project (App. A at p. A-19), and there is *no* evidence that the various officials involved ever discussed this subject in advance with any of the West Park developers, much less conspired with them (App. B at pp. A-30, A-32).[7]

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[7] The Court of Appeals reached its conclusions concerning the "conspiracy" on the basis of imaginative inferences drawn from a few unauthenticated, unidentified handwritten documents that had never been the subject of any deposition testimony. They were put into the "record" by being attached to an affidavit of respondents' counsel identifying them as documents that had been produced by petitioners during discovery. *See* App. A at p. A-6 n.2. These notes are hearsay of the rankest sort and were filed in plain violation of Rule 56(e). Such materials are inadmissible to defeat a motion for summary judgment. As the Ninth Circuit held in *Hamilton* v. *Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976):

The Eighth Circuit's reversal of a summary judgment in these circumstances directly conflicts with the holdings of other circuits that the mere opportunity to conspire cannot give rise to an inference that a conspiracy exists. *See Tose* v. *First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.) (despite numerous social and business relationships among defendants, summary judgments and directed verdicts were proper because "[p]roof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place"), *cert. denied*, 454 U.S. 893 (1981); *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462 (7th Cir. 1981) (summary judgment; "[g]iven the need for some degree of cooperation .... the opportunity to conspire evidence [which included close personal ties] lacks significant probative value"), *cert. denied*, 455 U.S. 988 (1982). *See also Impro Products, Inc.* v. *Herrick*, 1982-2 CCH Trade Cases ¶ 64,906, p. 72,606 (S.D. Iowa 1982) (summary judgment; "[w]ere motive and opportunity sufficient, almost all business entities could be brought to trial on antitrust claims by a wounded competitor"). The opinion below stands alone as the only one permitting a conspiracy to be inferred on a record which negates *any* communication

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> "[T]here was no proper foundation laid for the documentary 'exhibits.' Exhibits which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment."

See also, e.g., United States v. *Dibble*, 429 F.2d 598, 602 (9th Cir. 1970); *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 556-57 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd.*, 505 F. Supp. 1190, 1271-74 (E.D. Pa. 1980) (refusing to permit a party to resist summary judgment by relying on unexplained handwritten diaries).

Hence, the opinion of the Court of Appeals also provides a roadmap for litigants seeking to avoid summary judgment by counselling them to dump voluminous unauthenticated documents into the record in an effort to create an unverified impression of disputed material facts.

between the parties and which contains no evidence that makes the inference of a conspiracy more reasonable than the inference that the defendants were pursuing their own plans.

The conflict between the decision below and the approach of the other circuits to the proof necessary to establish a conspiracy is dramatically demonstrated by the treatment of conspiracy allegations in cases brought by terminated distributors. The circuits have almost unanimously recognized that the receipt by a manufacturer of complaints about one of its distributors from competing dealers is insufficient to permit an inference that there was a conspiracy between the manufacturer and those other dealers to terminate the distributor. *E.g., Schwimmer* v. *Sony Corporation of America,* 677 F.2d 946, 953 (2d Cir.), *cert. denied,* 51 U.S.L.W. 3362 (Nov. 8, 1982); *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981); *Bruce Drug, Inc.* v. *Hollister Inc.,* 688 F.2d 853 (1st Cir. 1982); *Davis-Watkins Co.* v. *Service Merchandise,* 686 F.2d 1190 (6th Cir. 1982); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.,* 678 F.2d 742, 744 (7th Cir. 1982).

This Court has recently granted certiorari in one of the few distributor termination cases deviating from the general rules governing conspiracies. *Spray-Rite Service Corp.* v. *Monsanto Co.,* 684 F.2d 1226, 1238-39 (7th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3633 (Feb. 28, 1983). The second question on which certiorari was granted in *Spray-Rite* is whether a vertical price-fixing conspiracy can be inferred solely from evidence that a manufacturer received price complaints from a distributor's competitors and thereafter did not renew the distributor's contract. Because of the obvious similarities between *Spray-Rite* and the instant case, they should be ordered argued and submitted in tandem to assist the Court's consideration of the issues

presented and to facilitate the consistent development of the law of conspiracy.[8]

Finally, the decision below conflicts with several general principles consistently used by the lower courts to evaluate circumstantial evidence. It violates the proposition that circumstantial evidence of a conspiracy must represent *substantial* evidence of a violation, rising above mere suspicion or speculation, and must be inconsistent with any other rational conclusion. *E.g., Weit* v. *Continental Illinois National Bank & Trust Co., supra,* 641 F.2d at 463. The Eighth Circuit also fell into the forbidden habit of piling inferences on top of inferences. *See Admiral Theatre Corp.* v. *Douglas Theatre Co.,* 585 F.2d 877, 884 (8th Cir. 1978) ("an inference which a jury is entitled to draw must be based upon proven facts and not upon other inferences"). Moreover, the Eighth Circuit relied on an improper "negative" inference—that the jury is entitled to disbelieve otherwise uncontradicted sworn testimony—also in violation of well-settled doctrine. *See Dyer* v. *MacDougall,* 201 F.2d 265, 268-69 (2d Cir. 1952); *Lundeen* v. *Cordner,* 354 F.2d 401, 406-09 (8th Cir. 1966). As noted above, not only is the "conspiracy" unproven, it is refuted by the uncontradicted testimony of the alleged co-conspirators.

II. The Eighth Circuit Misconstrued and Misapplied This Court's Decisions in Noerr and Pennington.

The *sole* basis for the Eighth Circuit's rejection of the West Park developers' *Noerr-Pennington* defense to the antitrust claims (Counts III, IV and VI of the Amended Complaint) was the holding that these petitioners "*may not be* protected by *Noerr* because their legitimate lobbying efforts *may have been*

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[8] Alternatively, this case should be held in abeyance pending disposition of *Spray-Rite* and then remanded to the Court of Appeals for reconsideration in light of this Court's opinion in *Spray-Rite.*

accompanied by illegal or fraudulent actions" (App. A at p. A-22, emphasis added). Neither the Eighth Circuit nor respondents have pointed to any evidence of specific illegal or fraudulent conduct by the West Park developers. As the Court of Appeals concedes, moreover, there is no evidence whatsoever of offers of personal financial gain or similar illegal conduct by them.

The Court of Appeals has thus allowed a limited exception to *Noerr-Pennington* to swallow the doctrine and to eviscerate the salutary principle that private parties are encouraged to exercise their first amendment rights and to petition governmental officials for favorable consideration. If the decision below were correct, the *Noerr-Pennington* protection could be removed in every case in which private parties were alleged to have sought and obtained governmental action for an anticompetitive purpose. It was precisely to avoid that result that the doctrine was created.

To fall within the "exception" purportedly applied by the Eighth Circuit, a plaintiff must adduce evidence of efforts to interfere with his governmental benefits *and* those efforts must be illegal or fraudulent, independent of the results of the City's action. There is no hint in the record of *conduct* by the West Park developers that was directed at interfering with respondents' zoning. Moreover, even if there were evidence of such conduct, it is well established that *Noerr-Pennington* applies with equal force to lobbying efforts aimed at denying governmental benefits to another party. The fatal flaw in the Court of Appeals' decision is that there is no evidence whatsoever of *independently* unlawful conduct in the present record.[9]

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[9] The unproven possibility that one petitioner suggested to city officials that a Famous Barr store would come to Cape Girardeau only if West Park Mall were allowed to develop is conceded by the Court of Appeals to be legal conduct and is certainly not evidence that city officials were induced "by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning." *Compare* App. A at p. A-19 &

A review of the cases relied on by the Eighth Circuit demonstrates that the decision below is inconsistent with the decisions of the other circuits on this "exception" to *Noerr-Pennington*. *See Sacramento Coca-Cola Bottling Co.* v. *Teamsters Local 150,* 440 F.2d 1096, 1099 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971) (evidence of "threats, intimidation and other coercive measures"); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972) (false filing with government agency).

The proper application of *Noerr-Pennington* in this situation is aptly illustrated by *Wilmorite, Inc.* v. *Eagan Real Estate, Inc.*, 454 F. Supp. 1124 (N.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1372 (2d Cir.), *cert. denied,* 439 U.S. 983 (1978). There, the developers of two regional shopping malls sued the owners and operators of other regional malls on the grounds that the defendants brought litigation to prevent the grant of zoning and building permits to the plaintiffs, allegedly in restraint of trade. Summary judgment was granted for the defendants on the basis of *Noerr-Pennington* and was summarily affirmed on appeal. The Eighth Circuit opinion in this case is flatly inconsistent with the Second Circuit's analysis of these issues in *Wilmorite* and

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n.6 *with* App. A at p. A-23. Similarly, the unsubstantiated possibility that this developer offered to make a right-of-way available to the public in September 1978 in connection with West Park Mall's zoning (App. A at p. A-7) does not constitute evidence of lobbying the City to interfere with respondents' zoning on other property seven months later. Significantly, the theory adopted by the Eighth Circuit was never pleaded or argued by respondents.

the related case of *Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18 (2d Cir. 1980).[10]

III. The Eighth Circuit Decision Conflicts with This Court's Decisions Defining the Elements of a § 1983 Claim Alleging a Deprivation of Property Without Due Process of Law.

In the Court of Appeals, respondents' sole allegation of a violation of § 1983 (Counts I and II) was that they had been deprived of procedural due process in connection with the alleged "reverter." In *Parratt* v. *Taylor*, 451 U.S. 527, 536-37 (1981), this Court succinctly summarized the elements of a § 1983 claim based on an alleged deprivation of property without procedural due process: The defendants must act under color of state law, there must be "property" involved, the alleged loss must amount to a deprivation, and the deprivation must be without due process of law. The Court of Appeals misapplied these controlling requirements and created a conflict with *Parratt* and other decisions of this Court because: (1) There was no "deprivation" of "property"; and (2) the alleged deprivation was not "without due process of law."

The Court of Appeals ignored this Court's opinion in *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), and created a conflict with other circuits when it held, without any real analysis, that "plaintiffs were effectively deprived of their C-4 classification" (App. A at p. A-13). Respondents were never deprived of their C-4 zoning because it is undisputed that there was no effective reverter. *See Reichenberger* v. *Pritchard*, 660 F.2d 280, 284-85 (7th Cir. 1981)

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[10] The *Noerr-Pennington* doctrine is equally applicable to respondents' civil rights and pendent tortious interference claims. *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980). The Court of Appeals' faulty analysis of the doctrine also infected its disposition of the appeal with respect to those claims.

(no "deprivation" created by opposition to occupancy certificates and liquor licenses when plaintiffs continued operations). All respondents lost, at most, was freedom from erroneous statements of opinion by City officials and misconceived ministerial changes in the zoning map. But there is no "propperty" (or even "liberty") in the desire for freedom from expression of erroneous opinions as to the status of zoning. As this Court stated in *Greenholtz, supra,* 442 U.S. at 7:

> "Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations."

The decision of the Court of Appeals also conflicts with *Parratt* v. *Taylor, supra,* because in each case the availability of post-deprivation remedies satisfies due process. The key to *Parratt* is the Court's conclusion:

> "Although he has been deprived of property under color of state law, *the deprivation did not occur as a result of some established state procedure.* Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U.S. at 543 (emphasis added).[11]

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[11] Last term, in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982), this Court reaffirmed that the "point" in *Parratt* was that it dealt with a tortious loss of property as a result of an unauthorized act rather than an established state procedure. Although the lower courts have not been entirely uniform in their application of *Parratt* to claims involving liberty interests or interests protected directly by other provisions of the Constitution, the case at bar, involving a procedural due process claim associated with a deprivation of property, is squarely within the core holding of *Parratt.*

Here, the City Manager's statements of opinion and his alteration of the zoning map were admittedly unauthorized acts that were not part of an established state or local procedure. Respondents had available to them the remedy of requesting the City Council to correct the City Manager's error; they also could have invoked state law to require the error to be corrected by the courts (and compensated, if appropriate). The evidence established that they eschewed these remedies because they knew they had not been deprived of their zoning, and they perceived the City Manager's mistake as a fortuitous basis for prolonging this litigation. Respondents cannot subvert *Parratt* and create a deprivation that is "without due process of law" simply by ignoring their state-law options and thereby bootstrapping their way into federal court under the Civil Rights Act.

The decision of the Eighth Circuit is also inconsistent with a long line of cases in this Court holding that a mere error or violation of local law does not constitute a violation of due process or an infringement of federal rights. *See Paul* v. *Davis,* 424 U.S. 693, 700 (1976); *Gryger* v. *Burke,* 334 U.S. 728, 731 (1948).

Finally, the Eighth Circuit's failure to apply these principles creates a conflict with the decisions in several other circuits. For example, in *Flower Cab Co.* v. *Petitte,* 685 F.2d 192 (7th Cir. 1982), there was a temporary deprivation of the right to assign a taxi-cab license by a city official who, without any demonstrated authority, stopped processing applications for transfers. The Seventh Circuit held that the plaintiffs had not established that they would succeed at trial on their procedural due process claim because under *Parratt* the loss was not the result of an established state procedure. *Id.* at 193. *See also Rogin* v. *Bensalem Township,* 616 F.2d 680, 694-95 (3d Cir. 1980) (no procedural due process violation in the denial of a building permit), *cert. denied,* 450 U.S. 1029 (1981); *Beasley* v. *Potter,* 493 F. Supp. 1059, 1072 (W.D. Mich. 1980) (no due process violation in enforcement of zoning laws, including a letter

to plaintiffs' bank alleging that the plaintiffs were violating a zoning ordinance). More generally, the Eighth Circuit decision is at war with numerous cases holding that a claim of an error or misapplication of state law by local officials does not constitute a violation of § 1983. *E.g., Crocker* v. *Hakes,* 616 F.2d 237, 239 (5th Cir. 1980) (per curiam) (improper application of zoning ordinance); *Hagee* v. *City of Evanston,* 530 F. Supp. 585, 587 (N.D. Ill. 1982) (illegal revocation of building permit).

CONCLUSION

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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April 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2314

Westborough Mall, Inc., a Corporation; George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its Sole General Partner,

Appellants,

v.

City of Cape Girardeau, Missouri, a Municipal Corporation; Paul W. Stehr, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Charles L. Drury, Drury Industries, Inc., a Corporation, May Department Stores Co., a Corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a Corporation, and May Centers, Inc., a Corporation,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: May 19, 1982

Filed: November 12, 1982

Before HEANEY, Circuit Judge, HENLEY,* Senior Circuit Judge, and BECKER,** Senior District Judge.

HEANEY, Circuit Judge

This action was brought by Westborough Mall, Inc., and others to challenge actions taken by the City of Cape Girardeau, city officials and various private individuals and business concerns involved with the development of the West Park Mall, a shopping center located in the City of Cape Girardeau. The Westborough Mall developers claimed that the city illegally acted to deprive them of their zoning rights without due process of law. They also alleged that city officials and the West Park Mall developers illegally conspired to preclude competition by improperly reverting the C-4 zoning the Westborough developers had obtained to construct the Westborough Mall and then granting development rights to the West Park group. Finally, they asserted that two ordinances rezoning the West Park Mall property were illegal.

On October 27, 1981, the district court entered summary judgment in favor of the city and the West Park Mall developers. Although we agree with the district court that the Westborough developers lack standing to challenge the zoning changes granted to the West Park group, we find there is sufficient evidence that the city deprived the Westborough developers of their zoning rights without notice or a hearing to preclude a judgment as a matter of law. We also believe there are genuine issues of material fact regarding the existence of an illegal agreement between city officials and the West Park Mall

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* Judge Henley assumed senior status June 1, 1982.

** The Honorable WILLIAM H. BECKER, United States Senior District Judge, Western District of Missouri, sitting by designation.

developers to intentionally interfere with the progress of the Westborough Mall. We therefore reverse the district court in part and remand for a trial on the merits of these claims.

Our holding is based upon the established rule that summary judgment is justified only when, viewing the facts and inferences that may be derived therefrom in a light most favorable to the nonmoving party, the court is convinced there is no evidence to sustain a recovery under any discernible circumstances. *Ralph's Distributing Co.* v. *AMF, Inc.*, 667 F.2d 670, 672 (8th Cir. 1981); *Vette Co.* v. *Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The burden is thus on the defendants to establish their right to judgment as a matter of law: there must be no genuine issue of material fact and no room for doubt or controversy. *See id.; St. Louis County Bank* v. *United States*, 674 F.2d 1207, 1209 (8th Cir. 1982). A review of the facts in this case demonstrates why, in view of these standards, the district court erred in granting summary judgment.

Both plaintiff George Staples, Jr., and defendant Charles Drury, President of Drury Industries, Inc., had expressed interest in developing a shopping mall in the City of Cape Girardeau in the early 1970's. In 1973, Staples entered into a long-term lease on approximately sixty-seven acres of land for the purpose of constructing a regional shopping facility, referred to as Westborough Mall. On June 5, 1974, the Cape Girardeau City Council enacted ordinance 904, which rezoned the Westborough Mall property to C-4, a zoning change that the owners of the property had applied for upon the mayor's suggestion to Staples that C-4 zoning was required for the development of a regional facility. This ordinance exempted the property from another local ordinance, Chapter 30, § 31, subsection (e) of the Code of Ordinances, which provided that if a shopping center was not constructed on property rezoned C-4 within three years, the zoning would automatically revert to the classification in force prior to the establishment of the C-4 district.

It was not until several years after the plaintiffs obtained C-4 zoning that Drury Industries, Inc., and May Centers of Cape, Inc., formed a partnership to develop a competing center, the West Park Mall. The West Park Mall was to be located on land owned by Drury that was less than one mile from the Westborough site.[1] The gravamen of plaintiffs' complaint is that the city and the West Park Mall developers conspired to preclude competition by the plaintiffs by illegally reverting their C-4 zoning. The plaintiffs claim that this action was taken to allow the May-Drury defendants the opportunity to secure tenants and begin operation of the West Park Mall.

The district court held that there was no evidence of a conspiracy and, further, that any action taken by the city or the private defendants regarding the status of plaintiffs' zoning had no effect on the viability of plaintiffs' project, since plans for the development of Westborough Mall had not materialized and the project was in essence a failure. The plaintiffs argue that the existence of an illegal conspiracy may be inferred from the nature of the relationship between city officials and defendant Charles Drury and from the improper actions taken by the city to revert plaintiffs' C-4 zoning only two days after granting the defendants' zoning petition, actions which allowed the defendants to complete their financing plans for the West Park Mall development. The plaintiffs also contend that there is a genuine issue of material fact as to the viability of their project, which renders summary judgment inappropriate.

The facts that support plaintiffs' position may be summarized as follows: Commencing in 1973, plaintiff Staples attempted to

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[1] The defendants concede that the two sites are equal in terms of development potential. The district court apparently assumed for purposes of deciding defendants' motions for summary judgment that Cape Girardeau was a "one shopping mall town." We adopt this assumption as well.

secure tenants for the Westborough Mall, especially anchor (or major) tenants such as J. C. Penney, Sears or Famous Barr. No major tenants expressed interest, however, and Staples abandoned his plans for approximately two years. Then, in September, 1976, Staples formed Westborough Mall Associates, a limited partnership, to develop the Westborough Mall site. The partnership raised $800,000 and received a building permit from the city in June, 1977. That same month, the city council enacted ordinance 1204, which corrected certain legal descriptions of the Westborough property and confirmed that the property was zoned C-4.

Site work on the Westborough project also began in 1977. Water drainage systems were installed, a survey was conducted and grading and other surface improvements were made. By December, 1978, the plaintiffs had expended more than $1 million on the development. No anchor tenants had yet committed themselves to the project, but letters of interest from many smaller stores had been received. Steps were being taken to secure additional financing to begin construction of the mall shell, and because of the reluctance of any major store to become a tenant, the plaintiffs were investigating a new anchor store concept—an "Elite" store composed of a number of small tenants.

Defendant Drury's plans for a shopping mall in Cape Girardeau were also proceeding during this time period. Drury sought to enter into a joint venture with the May defendants, who were experienced shopping mall developers. His discussions with May officials culminated in at least a tentative agreement with them to proceed to develop the West Park Mall in 1977. The agreement was a beneficial one in several respects, one of which was the probability of obtaining a Famous Barr store as an achor tenant because Famous Barr was a subsidiary

of May. An October, 1977, memorandum[2] by Drury to the Drury Industries Board of Directors suggested:

> Participation by [May Stores] in the center does not automatically guarantee that a Famous Barr store will be in the center. However, the track record is that [May] is not involved in any center that does not have a first-line May department store in it. A Famous Barr store in Cape Girardeau is a calculated risk. With [May] participation in our center, however, it is very doubtful that Famous Barr, in the event it does not go in our center, will go in any other competitive center in our market area.

Drury's contribution to the joint venture included assistance in dealing with city officials. Indeed, Drury had received a letter from the city attorney as early as 1974, about the same time that plaintiff Staples was informed by the mayor that C-4 zoning was required to build a shopping mall, which indicated that Drury could proceed to develop his center with C-2 or regular commer-

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[2] Many of the facts in support of plaintiffs' claims are contained in documents produced by the defendants in discovery and submitted by the plaintiffs to the district court. The plaintiffs' requests for additional time for discovery to depose the private defendants were denied by the district court. The plaintiffs allege on appeal that the district court erred in this refusal. We find no abuse of discretion. *See Moore* v. *Sylvania Electric Products, Inc.*, 454 F.2d 81, 83 (8th Cir. 1972).

The defendants challenge any reliance upon the documents submitted by the plaintiffs, alleging that they are an unauthenticated "hodge-podge" of notes that are inadmissible hearsay and should not be considered in evaluating the district court's grant of summary judgment. The district court ruled that it considered "all the evidence submitted," and we believe the documents are sufficiently reliable for us to determine whether the record as a whole supports the district court's decision in this case. *See generally Alexander Dawson, Inc.* v. *NLRB*, 586 F.2d 1300, 1302-1303 (9th Cir. 1978).

cial zoning.[3] As Drury later disclosed to May officials, his strategy was "low key." In 1977, he informed them that he already had talked with defendant Lawley, the city manager, and planned to talk with the mayor privately about obtaining C-2 zoning on all of the West Park Mall property. Drury believed that C-2 zoning would allow plans for the shopping mall to proceed in secret for as long as possible, thus avoiding any challenge by plaintiffs or others who might seek to thwart the development.

The evidence supports plaintiffs' suggestion that Drury and Lawley, the city manager, worked closely together to obtain the zoning change required for the West Park Mall property. After a September, 1978, meeting with Lawley and the city building commissioner and engineer, Drury told May officials that he had "tacit city approval for C-4 zoning for the shopping center site in exchange for the Silver Spring Road extension" right-of-way that he owned. Moreover, Drury reassured May officials that because the "center is desired by the powers that be," there was no risk in initially seeking C-2 zoning and worrying about the C-4 zone later. Indeed, a schedule adopted by the defendants for obtaining the necessary zoning was characterized by Drury as "C-2 zoning per Lawley schedule."

Finally Drury himself prepared the city manager's report to the city council concerning the West Park Mall's application for C-2 and then C-4 zoning. Lawley merely edited Drury's draft of this report prior to submitting it to the council on February 6, 1979. Drury's draft explicitly stated his desire to apply for C-2

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[3] The city attorney's letter suggested that a C-4 classification was preferable, however, and Drury appears to have recognized that C-4 zoning would ultimately be required for a regional shopping facility. The city attorney's letter gave Drury the option of performing initial work with only C-2 zoning.

zoning "with no mention of a subsequent or follow-up C-4 rezoning request."

Drury's zoning "strategy" raised some concerns with anchor tenants he was trying to attract to the West Park Mall, however. Notes of a phone conversation produced by Drury indicate that Drury's ability to obtain the required C-4 zoning was questioned by at least one prospective anchor tenant, J. C. Penney, even though Drury attempted to be very reassuring. "[Z]oning will not be a problem," Drury's notes stated, although because of plaintiffs' C-4 zoning, the J. C. Penney spokesperson could "hardly believe [Cape Girardeau] will zone * * * a second shopping center site."

Penney's concern regarding the West Park Mall zoning was important to the May-Drury defendants, since neither the plaintiffs nor the defendants had yet been successful in attracting anchor tenants. The West Park Mall was in direct competition with plaintiffs' Westborough Mall for these tenants, and the evidence in the record demonstrates that the defendants carefully monitored the plaintiffs' progress. For example, a June 6, 1978, memorandum from a May official states that because "Cape Girardeau cannot support two centers," Famous Barr should decide quickly whether it was interested in participating in the West Park Mall. The memo suggested that because of reports concerning plaintiffs' competing site, "[o]ur partner, Charles Drury is insisting we attempt to firm up both J. C. Penney and Sears now, followed immediately by Dillards if Famous Barr has not made up its mind by the end of this month."

Drury's concern about plaintiffs' progress is also reflected in his notes in September, 1978—the same month he met with city officials concerning the West Park Mall's rezoning application. These notes somewhat cryptically state, "Staples—trouble—attack zoning." Drury also wrote in February, 1979, "stop them from building so we maybe get a chance to build." The plaintiffs allege that this is exactly what happened in April of 1979.

On April 4, 1979, the city council approved defendant Drury's C-2 zoning application for the West Park Mall, after a hearing at which the plaintiffs and others objected to the change. On April 5, plaintiff Staples filed suit in state court to challenge the city council's action. The next day, Lawley, the city manager, announced to the press that plaintiffs' zoning had reverted from C-4 to residential. The local television news and the Cape Girardeau newspaper carried the story. On April 11, 1979, after conferring with the city attorney, Lawley instructed the city engineer to change the city's master zoning map to show a reversion of the Westborough site from C-4 to its original zoning. The engineer followed these directions.

Lawley presented his opinion that plaintiffs' C-4 zoning had reverted by operation of Chapter 30, § 31, subsection (e) of the Code of Ordinances to the city council on April 13. Lawley said that because the plaintiffs had not built a shopping mall on their property within three years of the original C-4 grant in 1974, this ordinance operated to automatically revert their zoning to the classification in force prior to the establishment of the C-4 district.[4] Lawley stated that the reverter would be applied to plaintiffs' property until he was ordered otherwise by the city council or a court. Although the city council discussed the issue, no action was taken at this meeting.

Thus, on April 20, 1979, a May official was able to report to a J. C. Penney official not only that the defendants' C-2 application had been granted, but also that

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[4] Lawley was wrong; plaintiffs' zoning was exempt from the application of the reverter ordinance in the Cape Girardeau Code of Ordiances. The defendants argue that because the plaintiffs knew Lawley was wrong and failed to bring the error to his attention, they somehow waived their right to challenge his actions. This argument is clearly without merit.

> the City Council has reviewed the file of the zoning proceedings on the Westborough site. In doing so, they have concluded that because of the wording of the zoning regulations, requiring essential completion of the project within three (3) years from the date of an enactment of the C-4 ordinance, and since no construction on the site has begun, that the C-4 zoning on the Westborough site has expired and ground has reverted to its previous zoning status of M-1, light industrial, and R-1, residential. In a conversation with the City Manager, he informed me that he is revising the zoning map to reflect this change. He has also directed the engineering department not to issue a building permit for the Westborough project. It is probable that this action will be challenged and will ultimately be resolved in court. However, this would effectively preclude any development by the Westborough group until this issue is resolved.

On May 23, 1979, plaintiffs' financier, Green, wrote to the city manager requesting clarification of the status of the Westborough Mall's zoning. Lawley replied that, in his opinion, the C-4 zoning had reverted, and he enclosed a copy of the zoning ordinances and the official zoning map, which reflected the reversion, with his response. Green accordingly notified the plaintiffs that he was suspending his attempts to obtain permanent financing for plaintiffs' project until the zoning issue was resolved.

The West Park Mall developers then obtained a second rezoning of their property from C-2 to C-4 on August 1, 1979. Over the next year, the plaintiffs were unable to progress in the development of Westborough Mall. Work on the West Park Mall project continued and the mall ultimately was opened in 1981. It was not until September 17, 1980, almost a year and a half after the master zoning map was changed, that the city

council adopted ordinance 1599, which "reaffirmed" that the Westborough Mall site was zoned C-4. As the plaintiffs had believed throughout, this ordinance confirmed that because the plaintiffs' C-4 grant was specifically exempted from the application of Chapter 30, § 31, subsection (e), no automatic reverter could be applied to the Westborough Mall site.

In view of these facts and the inferences that reasonable persons might draw from them, the plaintiffs contend on appeal that the district court erred in granting summary judgment on all seven counts of their complaint. We will consider each of the plaintiffs' allegations in turn.

I.

In Count 1 of their complaint, the plaintiffs allege that the City of Cape Girardeau, the city manager and five city council members violated 42 U.S.C. § 1983. The plaintiffs challenge the district court's grant of summary judgment as to this count on the grounds that the court erroneously held that the city is immune from suit under section 1983, the city took no official action with respect to plaintiffs' zoning for the mall, and the acts of the defendants had no detrimental effect on plaintiffs' development.

In *Gorman Towers, Inc.* v. *Bogoslavsky,* 626 F.2d 607 (8th Cir. 1980), we held that local officials who acted in a legislative capacity were immune from suit under section 1983. *Id.* at 613-614. Our ruling was based in part upon the recognition that municipalities may be held liable for unconstitutional conduct. *Id.* at 613. *See Owen* v. *City of Independence,* 445 U.S. 622, 657 (1980). The plaintiffs do not contend that the district court misapplied *Gorman* with respect to the individual city officials. Rather, they interpret the court's ruling as granting the city itself immunity, and argue that this holding must be reversed.

The city acknowledges that it may be liable under section 1983 if official action was taken to deprive the plaintiffs of their constitutional rights, and we believe that the district court's opinion does not hold to the contrary. In our view, the district court based its grant of summary judgment in favor of the city primarily on its view that no official action was taken by the city with respect to the alleged reversion of plaintiffs' C-4 zoning. On appeal, the city has argued that no official action was taken because the city manager's actions concerning the C-4 reversion were merely expressions of his own opinion and did not result in any change in the status of plaintiffs' zoning. In context of a motion for summary judgment, this contention cannot be accepted.

As chief executive officer of the city, the city manager is responsible for enforcing the city's zoning ordinances. *See* Mo. Rev. Stat. § 78.610(2). After conferring with the city attorney, city manager Lawley acted pursuant to this authority and directed that the official zoning map be changed to reflect a reversion of the zoning on plaintiffs' Westborough Mall site from C-4 to its prior classification. Lawley also instructed that no building permit should be issued for the mall. The city engineer followed these directions.

Moreover, although the city manager is "subject to the direction and supervision of the council," *id.*, Lawley communicated his opinion that Chapter 30, § 31, subsection (e) applied to revert plaintiffs' C-4 zoning to the city council, and told them of his instructions to the city engineer. The council enacted no ordinance explicitly ratifying Lawley's conduct, but an ordinance would not necessarily be required if the council agreed with Lawley's position. The city's argument that a city manager's action becomes official policy only upon the enactment of a resolution by the council is thus unpersuasive in this situation, since by knowing inaction, the city may have ratified Lawley's action here.

The official zoning map of the city was changed to eliminate plaintiffs' C-4 zoning. Lawley, the mayor and the city engineer publicly stated that the plaintiffs had lost their C-4 zoning, and Lawley reiterated this position in his letter to plaintiffs' financier. This erroneous reversion was corrected when the city enacted ordinance 1599 "reaffirming" plaintiffs' right to C-4 zoning, but from April, 1979, to September, 1980, the plaintiffs were effectively deprived of their C-4 classification.

We therefore find that the district court erred in its summary judgment that the city took no official action with regard to Westborough Mall zoning. The actions by city officials in this case were not merely isolated incidents, *see Landrigan* v. *City of Warwick,* 628 F.2d 736, 746-747 (1st Cir. 1980), but rather may have represented the official policy of the city concerning the status of plaintifs' zoning. *See Black* v. *Stephens,* 662 F.2d 181, 191 (3d Cir. 1981), *cert. denied,* 102 S.Ct. 1646 (1982); *Quinn* v. *Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 448 (2d Cir. 1980). We find the plaintiffs have presented sufficient evidence that the reversion of their zoning "was caused by the official conduct of * * * those whose acts may fairly be said to represent official policy," *Owen* v. *City of Independence,* 589 F.2d 335, 337 (8th Cir. 1978), to preclude a grant of summary judgment on this ground.

The district court also appeared to base its grant of summary judgment on its findings that the city manager's actions "had no detrimental effect on Westborough Mall's development in light of the Mall's prior history and potential by April, 1979," and that there was "no evidence of a link between the acts of either [the city defendants or the West Mall developers] to damages suffered by plaintiffs." As the district court correctly noted, the plaintiffs owed money to the Penzel Construction Company and to the Bank of New Madrid, had been unsuccessful in securing anchor tenants and had not yet filed an ap-

plication for the financing necessary to develop the Westborough Mall when the city announced in April, 1979, that the plaintiffs' C-4 zoning had reverted to residential and manufacturing classifications.

We agree with the plaintiffs, however, that the district court failed to view the evidence in a light most favorable to them when it concluded as a matter of law that the plaintiffs' interests were in no way damaged by defendants' actions. The district court, in essence, held that the evidence compelled the conclusion that the Westborough Mall failed because of plaintiffs' poor business skills. In making this judgment, the court made "a choice of inferences to be drawn from the subsidiary facts" presented by both parties, *United States* v. *Diebold,* 369 U.S. 654, 655 (1962), a choice which is impermissible on a motion for summary judgment.

Our review of the record leads us to conclude that there is a genuine issue of material fact as to the viability of plaintiffs' development. Staples' testimony,[5] Green's testimony and documents produced by the defendants could reasonably support the conclusion that the Westborough Mall failed to attract major tenants and to obtain further financing because the land lost its C-4 designation at the same time that a competitor—defendants' West Park Mall development—was granted the required zoning to develop a regional shopping facility. The plaintiffs had invested over $1 million in the

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[5] The defendants characterize Staples' testimony as "self-serving and conclusory opinions and conjecture," which they argue cannot serve as a basis for denying summary judgment. Unlike the situations presented in the cases cited by the defendants, *see, e.g., Pan-Islamic Trade Corp.* v. *Exxon Corp.,* 632 F.2d 539, 556-557 (5th Cir. 1980), *cert. denied,* 454 U.S. 927 (1981); *Thornhill Publishing Co.* v. *General Telephone & Electronics Corp.,* 594 F.2d 730, 738 (9th Cir. 1979), there are specific facts which support the plaintiffs' view of the effect of the reverter, however.

Westborough Mall project; site preparations had been made and letters of interest had been received. The defendants viewed plaintiffs' progress as a potential threat to their plans. Moreover, there is evidence that temporary financing could perhaps have been obtained to construct the Westborough Mall shell, even without an anchor tenant committed to the project, had plaintiffs been given the opportunity to develop the "Elite" store concept. The plaintiffs' financier halted his efforts to obtain such financing after the zoning controversy developed.

Before the reverter in April of 1979, the plaintiffs had a valuable leasehold interest in the only land in Cape Girardeau that was zoned for an integrated shopping center and on which site improvements had already been made. Assuming Cape Girardeau is a "one shopping mall town," this interest should have been marketable, yet the evidence suggests that the plaintiffs may have been unable to sell their leasehold after the announcement of the reversion, as a result of the "cloud" that had been placed over the status of the zoning of their property. The plaintiffs have thus presented facts that they were damaged by the applicaton of the reverter to their property through September, 1980, when the council enacted ordinance 1599 reaffirming their entitlement to the C-4 classification. We therefore find that the district court erred in concluding as a matter of law that the plaintiffs were not daamged in any way by the reverter, and accordingly we hold the court erred in granting summary judgment on Count 1 of plaintiffs' complaint.

II.

Counts 2 through 4 of plaintiffs' complaint contain various allegations of a conspiracy between the city defendants and the West Park Mall developers regarding the reverter of plaintiffs' C-4 zoning and the grant of C-2 and then C-4 zoning to the private defendants: Count 2 alleges a conspiracy between the city and the West Park Mall developers to deprive the plaintiffs of

their constitutional rights; Count 3 alleges a conspiracy among all the defendants to restrain trade in violation of section 1 of the Sherman Act; and Count 4 alleges a conspiracy to monopolize the shopping center market in violation of section 2 of the Sherman Act. In granting summary judgment on these claims, the district court stated that the "plaintiffs have been unable to unearth a shred of evidence linking an improper act of the City defendants to the private developers' efforts to build West Park Mall."

The plaintiffs concede that "the evidence of conspiracy is not direct and overwhelming," and we agree with this statement. Nonetheless, the elements of a conspiracy are rarely established through means other than circumstantial evidence, *see, e.g., Crowe* v. *Lucas,* 595 F.2d 985, 993 (5th Cir. 1979), *cert. denied,* 102 S.Ct. 1251 (1982), and summary judgment is only warranted when "the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided." *Admiral Theatre Corp.* v. *Douglas Theatre Corp.,* 585 F.2d 877, 883 (8th Cir. 1978) (citations omitted). The court must be convinced that the evidence presented is insufficient to support any reasonable inference of a conspiracy. *Id.* at 884. *See Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 472-473 (1962).

Our review of the record in view of these standards convinces us that the district court erred in its conclusion that there was *no* evidence of a conspiracy between the city officials and the May-Drury defendants.

In order to establish a cause of action based upon a conspiracy in this case, the plaintiffs had to show with at least circumstantial evidence that the private developers made a deal with the city or with at least some of the city officials whereby the city would act to stop plaintiffs' Westborough Mall by casting doubt upon the status of their zoning long enough to

allow the defendants' West Park Mall to secure tenants and to obtain a sufficient "head start" on construction. The circumstantial evidence of such an illegal agreement consists of the close relationship between defendant Drury and city officials, the defendants' concern about the progress of plaintiffs' competing site, Drury's notes to "stop them from building so maybe we get a chance to build," and the timing of the reverter of plaintiffs' C-4 zoning only two days after the city council enacted an ordinance that allowed the West Park Mall developers to begin construction.

Defendant Drury has filed an affidavit stating that no Drury defendants "knew in advance about, participated in, or contributed to Mr. Lawley's opinion" regarding the C-4 reversion, and Lawley has denied the existence of any agreement to assist the West Park Mall developers by taking plaintiffs' zoning from them, but we find there is sufficient evidence of a possible conspiracy to illegally revert plaintiffs' zoning to withstand a motion for summary judgment.

The preferential treatment accorded Drury by city officials is illustrated by the facts concerning the West Park Mall zoning. Drury was confident that zoning would not present a problem for his development plans at a very early date, even though the plaintiffs had obtained a C-4 classification and the defendants believed that Cape Girardeau could only support one shopping mall facility. Drury was allowed to proceed under a C-2 classification, while the plaintiffs were advised that a C-4 zone was required. Drury's feeling that the West Park Mall was "desired by the powers that be" suggests that he had struck an agreement with city officials that would ensure his mall's success. Although proof of private meetings with city officials may not be sufficient evidence of any improper arrangements, Drury's involvement with city officials went beyond such meetings: Drury obtained a "tacit" agreement for C-4 zoning

prior to any city council action concerning either the C-2 or C-4 zoning changes that he requested, he wrote most of the city manager's report to the city council concerning his rezoning request, and he referred to his zoning application plans as "C-2 per Lawley schedule."

We wish to emphasize that this preferential treatment alone would not be grounds for a cause of action by the plaintiffs: the relationship between the city and Drury is, however, evidence from which a trier of fact could infer the existence of a conspiracy to deprive the plaintiffs' of their zoning rights.

Other circumstantial evidence of an illegal agreement to revert the plaintiffs' C-4 zoning includes the defendants' desire to stop plaintiffs' development, or at least slow it down, so that West Park Mall could be brought to a stage where it could effectively overcome competition by the plaintiffs. Prior to the reverter announcement, the record shows that the May-Drury defendants considered the Westborough Mall to be a "competing site"—indeed, they concede there is no inherent advantage to their location over that of the plaintiffs. They acted to secure anchor tenants as quickly as possible when it appeared that the plaintiffs might be in a position to sign such tenants. The plaintiffs had begun site preparations and had obtained both the required zoning and a building permit from the city when Drury's notes in February, 1979, state "stop them from building so we maybe get a chance to build."

The May-Drury defendants do not deny that the reversion of plaintiffs' zoning was of great benefit to them. Only days after the reverter was announced, they told J. C. Penney officials, who had doubted Drury's ability to obtain council approval for another C-4 district in the City of Cape Girardeau, that the reverter would effectively preclude any development of the Westborough Mall until the status of plaintiffs' zoning was resolved in court.

Finally, the timing of the reverter supports an inference of a conspiracy to delay plaintiffs' project by reverting their C-4 zoning. Ordinance 904, enacted in 1974, granted the plaintiffs a C-4 classification and specifically stated that the grant was exempt from the requirement of the city's reverter ordinance. Yet, in 1979, two days after the defendants obtained C-2 zoning on all of their property, and two years after the automatic reverter would have gone into effect, the city manager reviewed the Westborough file, missed the explicit reference to the exemption, forgot about its existence even though he was the city manager at the time the ordinance was enacted, and announced that, in his opinion, the plaintiffs' C-4 zoning had reverted to its prior classification.

It is true that no city official appears to have a direct financial interest in the West Park Mall, but Drury's association with the May defendants may have allowed him to offer the city a Famous Barr store if the West Park Mall were allowed to develop according to Drury's plans, which the plaintiffs in effect could not.[6] Or, perhaps the city was interested in Drury's right-of-way, which he may have offered the city in exchange for the "tacit" agreement for a C-4 district in September, 1978.

Under all of these circumstances, giving the plaintiffs the benefit of the reasonable inferences that may be derived therefrom, we believe the district court erred in concluding as a matter of law that no conspiracy existed. The inference that

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[6] Famous Barr is a subsidiary of the May Company. In a February 14, 1979, phone conversation with a May official regarding Drury's strategy to obtain the required zoning changes for the West Park Mall, Drury stated, "[w]e'll have to talk to these people quietly—we can't bring this out in the open meeting, but * * * if we have to, we'll produce the letter from Famous saying * * * this is the only site in Cape Girardeau that they will * * * [locate in]." While this conduct alone is not illegal, it is evidence from which a trier of fact could infer an illegal agreement with the city to revert the plaintiffs' zoning.

defendant city officials and the West Park Mall developers conspired to deprive the plaintiffs of their legal right to C-4 zoning and to block their development plans is not an irrational one. Although the facts in support of such a conspiracy are not conclusive, they also are not "meaningless," as the defendants contend.

In sum, our review of the facts presented thus far convinces us that the defendants were not entitled to a summary judgment in their favor under section 1983 or under sections 1 or 2 of the Sherman Act. Although the record is not fully developed, we believe the district court erred in granting summary judgment on the grounds that there was no official action by the city regarding the status of plaintiffs' zoning, that there was no evidence of a conspiracy, and that there was no evidence that the actions of the defendants had a detrimental effect on the viability of the plaintiffs' project or the value of their leasehold interest. The city may be liable to the plaintiffs under section 1983 if the plaintiffs establish at trial that the city acted under color of state law to deprive them of their property rights without due process. *See generally Parratt* v. *Taylor,* 451 U.S. 527, 535 (1981). The West Park Mall defendants may also be liable under section 1983 if the plaintiffs can prove the existence of a conspiracy with the city to deprive them of these rights.

Moreover, we cannot say at this stage that the plaintiffs' antitrust claims are wholly without merit. The plaintiffs may recover under their section 1 Sherman Act claim if they prove at trial that there was an agreement between the city officials and the West Park Mall developers which was intended to harm or unreasonably restrain trade; that as a direct result plaintiffs have been injured; and that the damages sustained are capable of reasonable ascertainment and are not speculative or conjectural. *Rosebrough Monument Co.* v. *Memorial Park Cemetary,* 666 F.2d 1130, 1138 (8th Cir. 1981), *cert. denied,* 107 S.Ct. 2915 (1982); *Admiral Theatre Corp.* v. *Douglas Theatre Co., supra,*

585 F.2d at 883-884. The defendants may also be liable under section 2 of the Sherman Act for a conspiracy to monopolize the shopping center market if the plaintiffs can establish: (1) the existence of a conspiracy, (2) overt acts in furtherance of the conspiracy, (3) a substantial amount of commerce, and (4) a specific intent to monopolize.[7] *See generally* 2 Von Kalinowski, Antitrust Laws and Trade Regulation, § 6.01[1]&[3] (1982); 3 *id.*, § 7.01.

The defendants assert that even if the plaintiffs successfully prove all the elements of a section 1983 or an antitrust violation, the district court's grant of summary judgment should be upheld because all the defendants were protected from liability under the *Noerr-Pennington* and *Parker* v. *Brown* doctrines. We disagree. The *Noerr-Pennington* doctrine exempts from the

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[7] Count 6 of plaintiffs' complaint also alleged an illegal monopoly in violation of section 2 of the Sherman Act. Assuming arguendo that the regional shopping center market in Cape Girardeau is the relevant market for antitrust purposes and that Cape Girardeau would only support one shopping center, the defendants argue that the plaintiffs' monopolization claim must fail as a matter of law because the West Park Mall defendants are "natural monopolists" who succeeded through fair competition. These defendants boldly assert that they "succeeded simply because they knew what they were doing and plaintiffs failed because they didn't." We rejected the district court's conclusion to this effect above. When the facts are viewed in a light most favorable to the plaintiffs, there is evidence to support the inference that the defendants achieved their "monopoly" through "exclusionary, unfair, or predatory means." *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 991 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). *See Superturf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1277, 1279 (8th Cir. 1981). While "a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it," in this case there is an "affirmative showing of conduct from which a wrongful intent can be inferred." *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) (citations omitted). Hence, the district court erred in granting summary judgment against the plaintiffs on their illegal monopolization claim.

antitrust laws lobbying and other joint efforts by private individuals to obtain legislative or executive action. *See United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961). *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, *supra,* § 46.04. This exemption is based upon the First Amendment and hence extends to any legitimate use of the political process by private individuals, even if their intent is to eliminate competition. *United Mine Workers* v. *Pennington, supra,* 381 U.S. at 670. The plaintiffs argue the *Noerr* exemption does not apply in this case because government officials are alleged participants in the conspiracy. *See Duke & Co.* v. *Foerster,* 521 F.2d 1277, 1281-1283 (3d Cir. 1975). This coconspirator exception has been criticized, however, *see, e.g., Metro Cable Co.* v. *CATV of Rockford, Inc.,* 516 F.2d 220, 229-230 (7th Cir. 1975), and we decline to base our decision on the presence of the government as a defendant herein.

Rather, we find that the defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions. *See Sacramento Coca-Cola Bottling Co.* v. *Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096, 1099 (9th Cir.), *cert. denied,* 404 U.S. 826 (1971); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286, 1296-1298 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972). The *Noerr-Pennington* doctrine was not "intended to protect those who employ illegal means to influence their representatives in government." *Sacramento Coca-Cola Bottling Co.* v. *Chauffeurs, Teamsters & Helpers Local 150, supra,* 440 F.2d at 1099. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, *supra,* § 46.04[3] at 46-55. In *Gorman Towers, Inc.* v. *Bogoslavsky, supra,* we recognized that actions beyond "traditional political activity" may not be protected by the *Noerr* exemption. *Id.,* 626

F.2d at 615. Because the plaintiffs have presented facts that support an inference of unlawful conduct—city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning—the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment. *See Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 266 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1293 (1982).

We also disagree with the district court's holding that the state action exemption established in *Parker* v. *Brown*, 317 U.S. 341 (1943), precludes any liability by the defendants as a matter of law. *Parker* immunity is intended to exempt from the antitrust laws state actions that are anticompetitive in nature. "[W]here a restraint upon trade or monopolization is the result of valid governmental action * * * no violation of the [Sherman] Act can be made out." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc., supra*, 365 U.S. at 136. The *Parker* doctrine applies to municipal action "in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Community Communications Co.* v. *City of Boulder*, 50 U.S.L.W. 4144, 4147 (1982). Even if zoning in general can be characterized as "state action," *see Sound, Inc.* v. *American Telephone & Telegraph Co.*, 631 F.2d 1324, 1334 (8th Cir. 1980) (factors relevant to determining "state action"), a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy. *See Stauffer* v. *Town of Grand Lake*, 1981-1 CCH Trade Cases ¶ 64,029 at 76,330 (D. Colo., October 9, 1980); *Mason City Center Associates* v. *City of Mason City*, 468 F. Supp. 737, 741-744 (N.D. Ia. 1979). *See also Guthrie* v. *Genesee County*, 494 F. Supp. 950, 955-958 (W.D. N.Y. 1980).

III.

Finally, we must address plaintiffs' contentions that the district court erred in granting summary judgment against them on their state law claims: Count 5, which alleged a conspiracy to interfere with plaintiffs' valid business relationships and contract rights; and Count 7, which challenged the ordinances granting C-2 and C-4 zoning to the defendants. The district court dismissed Count 5 by holding that the efforts of the West Park Mall developers were legitimate business activities and that plaintiffs' mall failed because of their poor business skills, not because of any actions by the defendants. Because of our finding that the district court erred in making these conclusions as a matter of law, we also reverse the grant of summary judgment as to Count 5 of plaintiffs' complaint. We believe there are genuine issues of material fact as to whether the defendants illegally conspired to thwart plaintiffs' efforts to develop Westborough Mall and whether the reversion of plaintiffs' C-4 zoning caused the plaintiffs' development to fail. As we have previously stated, we decline to apply the *Noerr-Pennington* doctrine under the circumstances of the present case, and, therefore, reject defendants' argument that it supplies an alternative ground for upholding the district court's grant of summary judgment on this count. *Cf. First National Bank* v. *Marquette National Bank,* 482 F. Supp. 514, 524-525 (D. Minn. 1979), *aff'd,* 656 F.2d 191 (8th Cir. 1980), *cert. denied,* 450 US.. 1042 (1981) (*Noerr-Pennington* doctrine protects the defendants from liability on tortious interference claim "to the extent that plaintiffs' claims are based upon lobbying and litigation activities [and] there are no genuine issues as to any material facts").

Count 7 of plaintiffs' complaint challenged the reasonableness of the rezoning of the West Park Mall. The district court held that the plaintiffs had no standing to challenge the change in defendants' zoning and in any case found ordinances 1437 and 1369 to be valid. We affirm the district court's grant of summary judgment on this count because we

agree that the plaintiffs lack standing under state law to object to the ordinances at issue.

Missouri law currently provides that in order to have standing, the plaintiffs must be aggrieved parties—that is, they "must demonstrate a specific and legally cognizable interest in the subject matter of the [challenged] decision and that [they have] been directly and substantially affected thereby." *Palmer* v. *St. Louis County,* 591 S.W.2d 39, 41 (Mo. App. 1979) (citations omitted). *See* Mo. Rev. Stat. § 89.110. Competitive disadvantage alone does not give rise to standing, *Schmitt* v. *City of Hazelwood,* 487 S.W.2d 882, 888 (Mo. App. 1972), and although plaintiffs' leasehold is less than one mile from the West Park Mall, they have failed to demonstrate how the city's rezoning of defendant's property—apart from the reversion of plaintiffs' C-4 zoning—affects a protectable interest of the plaintiffs beyond mere competitive disadvantage. *See Palmer* v. *St. Louis County, supra,* 591 S.W.2d at 41. The plaintiffs' land is not directly adjacent, contiguous to, or within sight of defendants' land. *See, e.g., Schweig* v. *City of St. Louis,* 569 S.W.2d 215, 220-221 (Mo. App. 1978) (and cases cited therein).

The harm allegedly suffered by the plaintiffs as a result of the city defendants' actions occurred because of the reversion of *their* C-4 zoning. Although the fact that defendants' property was rezoned is related to the damage to plaintiffs' interests, the rezoning *alone* would not have caused any special injury to them other than affording them competition. Thus, we affirm the district court's grant of summary judgment in favor of all defendants on Count 7 of plaintiffs' complaint.[8] Because we agree that the plaintiffs lack standing under current state law, we need not consider the district court's rulings on the substantive issues raised by the plaintiffs.

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[8] It has been suggested that Missouri law on the issue of standing may be undergoing some change. If any such change occurs prior to the entry of final judgment by the district court, the court is free to reconsider its decision that plaintiffs lack standing in view of the new developments in state law.

IV.

In conclusion, we reverse the district court's grant of summary judgment on Counts 1 through 6 of plaintiffs' complaint. The district court, in holding that the plaintiffs were not entitled to judgment on these claims as a matter of law, weighed the evidence presented without giving the plaintiffs the benefit of the reasonable inferences that could be made from the facts presented; genuine issues of material fact preclude summary disposal of these counts. The district court correctly held that the plaintiffs lack standing to challenge the West Park Mall rezoning under current state law and we, therefore, affirm the grant of summary judgment in favor of all defendants on Count 7 of plaintiffs' complaint.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

No. S 80-105 C

Westborough Mall, Inc., a Corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,

Plaintifs,

vs.

City of Cape Girardeau, Missouri, a Municipal Corporation, Paul W. Stehr, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Charles L. Drury, Drury Industries, Inc., a Corporation, May Department Stores Co., a Corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a Corporation, and May Centers, Inc., a Corporation,

Defendants.

MEMORANDUM AND ORDER

(Filed October 27, 1981)

This matter is before the Court upon the motions of Charles L Drury, Drury Industries, Inc. (Drury defendants), the May Department Stores Company, the May Centers, Inc., the May Centers of Cape, Inc. (May defendants), Paul W. Stehr, Robert Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, the City of Cape Girardeau, Missouri, and West Park Associates, for summary judgment on each count of plaintiffs' seven count complaint which includes alleged violations of

42 U.S.C. § 1983 (Count 1), a conspiracy to violate plaintiffs' constitutional rights as made actionable under the same statute (Count 2), a violation of the Sherman Act, 15 U.S.C. § 1 (Count 3), a violation of 15 U.S.C. § 2 for a conspiracy to monopolize (Count 4), an alleged conspiracy to interfere with plaintiffs' valid business relationships (Count 5), a Sherman Act count against five members of the Cape Girardeau City Council (Count 6) and the prayer for declaratory judgment and injunctive relief, to-wit: the striking down of two ordinances of the Cape Girardeau City Council (Count 7) pursuant to Rule 56 of the Federal Rules of Civil Procedure.

The cause of events which gave rise to this suit surrounded the failure of one group of developers and the success of another group in their efforts to build a regional shopping center in Cape Girardeau, Missouri. Plaintiff, Westborough Mall, Inc., is a Missouri corporation which in 1973 leased approximately sixty seven (67) acres of land in Cape Girardeau, Missouri, at Bloomfield Road and Missouri Highway 61 (Kingshighway). George Staples, Jr., a principal of Westborough Mall Associates, a Missouri limited partnership, was the prime mover and organizer of the Westborough Mall project which involved the building and managing of a major retail shopping center on the above mentioned site. Staples made several attempts to secure "anchor" tenants for the Mall project—major department stores which would enhance the attractiveness of the project to other tenants and retail customers. In June of 1974, Westborough Mall, Inc. was granted C-4 zoning by the City of Cape Girardeau which provided for the construction of an enclosed integrated shopping mall containing three major department store tenants, as well as other small specialty shop tenants. Staples continued to solicit a supporting commitment from major department stores but was unsuccessful and shelved his development plans for approximately two years. In 1976, Staples formed a limited partnership which raised $800,000 con-

tributed by various local limited partners in a further effort to salvage the project.

By mid-1977 Staples arranged for site preparation including grading work to be done by the Penzel Construction Company of Jackson, Missouri. Due to unforeseen and substantial rock formations on the property, the grading project proved to be considerably more difficult and expensive than had been originally contemplated. By late 1978 the Penzel Construction Company was claiming approximately $300,000 owed by Staples which had not been paid. Soon after the receipt of the first unpaid bills Staples removed his wife, son and daughter as general partners of the limited partnership. Penzel asserted mechanic's liens against the Westborough Mall property and filed suit against Westborough Mall Associates in May, 1979 seeking to collect more than $312,000. This group also was indebted to the Bank of New Madrid, Missouri in the sum of Two Hundred Eighty Six Thousand Dollars ($286,000). At this time the partnership had no liquid assets and no letters of commitment from any major tenants.

In June, 1978, Staples had agreed with Penzel Construction Company that the Company was to construct a shell building on the site. This contract contained a forfeiture clause which provided that if financing for the mall had not been arranged by May 1, 1979 Westborough Mall Associates was to forfeit $5,000 to Penzel. As of that date no commitment had been obtained for financing and the grading bill had not been paid. Penzel, a limited partner in Staples' Westborough Mall Associates, had to institute a suit against the partnership and Staples in state court in an attempt to collect the $5,000 penalty and the unpaid grading bill. Such bill has not been paid to date. In fact, no substantial, successful preparations had been made at that time, and no building plans have ever been prepared for any structure at the Westborough Mall site. In sum, by mid-1979,

Westborough Mall had no liquid assets, no major department store tenants, no building plans, no commitments for financing, and had past numerous projected target dates promised by Staples throughout the years. In 1979, Westborough Mall was no closer to viability than it was in 1973.

The City Manager of Cape Girardeau, Missouri, defendant W. G. Lawley, was referred to in an article in the April 18, 1979 issue of the Southeast Missourian—a local daily newspaper—as questioning the validity of Westborough's C-4 zoning due to a requirement in the Cape Girardeau zoning code which provided that construction had to commence within three years of the grant of C-4 zoning or the zoning would lapse. Lawley later ordered the zoning maps of the City changed so as to reflect that C-4 zoning for Westborough Mall had lapsed and instructed the City Engineer of Cape Girardeau not to issue building permits for the Westborough site. There exists no evidence at this time before this Court which would indicate that any of the moving defendants knew anything of Lawley's opinion or his acts prior to the time they were reported in the newspaper, or in any way prompted him to act as he did. In fact, Lawley was unaware that the C-4 zoning given to the Westborough Mall site contained an exemption to this three year requirement, and consequently the Westborough group actually enjoyed C-4 zoning throughout this time frame.

Staples argues that this action by Lawley had a substantial chilling effect on the prospect of the Westborough Mall project attaining major tenants and financing. Nevertheless, Staples continued to reassure his partners and armed with his own belief that Westborough Mall's C-4 zoning remained in effect and his attorney's opinion to that effect, he professed an intention to proceed with the project as if Lawley had never made his statements. Staples never petitioned or in any way approached the City for a clarification or reaffirmation of his C-4 zoning.

On May 14, 1979 Westborough Mall, Inc. agreed to sell the leasehold interest it held in the site, yet no sale has ever been effected.

The Mall eventually built in the City of Cape Girardeau, the West Park Mall, is located at Route K and Mount Auburn Road. The site was owned by Drury Industries which in late 1978 entered into a partnership agreement with the May Centers of Cape, Inc. At the time of the execution of this agreement there existed no arrangement whereby May Department Store or Famous Barr, major retail department stores, would be located in the shopping center. Famous Barr although had expressed some interest in entering the Cape Girardeau market but as early as 1976 had decided not to open a store there.

The City Attorney of Cape Girardeau had assured Drury that a shopping center could actually be constructed on C-2 zoning and Drury requested the City to rezone to C-2 those portions of the site which were not already so zoned. When the application for C-2 zoning was submitted, the finalized layout of the shopping center had not been sufficiently completed in order to file an application for C-4 zoning. The developers told the City that C-4 zoning would be requested as soon the plans had become sufficiently finalized.

Pursuant to governing ordinances, a public hearing was held before the Planning and Zoning Commission of Cape Girardeau concerning this C-2 application. This request was vehemently opposed by Staples and his business associates, but the Planning and Zoning Commission recommended the approval of the application. Further, public hearings were held before the City Council in accordance with the applicable regulations, and the Council on April 4, 1979 approved the C-2 zoning. A few months later the developers prepared and filed an application for C-4 zoning, and again after extensive public hearings before both the Planning and Zoning Commission and

the City Council, the Council voted to grant C-4 zoning to the West Park Mall site. The West Park Mall is now largely a reality with two major anchor tenants and the vast majority of its rentable space being occupied.

Counts 1 and 2 of the amended complaint state a claim for damages and attorney's fees under 42 U.S.C. § 1983. Count 1 refers only to the City officials and Count 2 to all of the defendants. Count 2 is an allegation that all of the defendants acted pursuant to an agreement and conspiracy under "color of state law to deprive plaintiffs of their rights...secured to them by the Fourteenth Amendment of the United States Constitution." The deprivation of plaintiffs' rights secured by the due process and equal protection clauses in the Constitution resulted from the active subversion of the development of Westborough Mall while developing the West Park Mall. The acts which constituted this deprivation where the statements of Lawley concerning the lapse of the C-4 zoning of Westborough Mall and the securing of the City Council's ordinances 1437(C-2) and 1469(C-4) permitting the development of West Park Mall.

The City Manager's statement of his own opinion concerning the lapse of Westborough Mall zoning, in this Court's view, had no detrimental effect on Westborough Mall's development in light of the Mall's prior history and potential by April, 1979. The City had taken no official action with regard to Westborough Mall zoning. Staples assured all his business associates that this was merely an individual's opinion and that no City Council member had unequivocably stated that Westborough Mall zoning had in fact lapsed. Furthermore, upon reviewing all the evidence submitted to this Court upon this motion, it is clear that there is no indication that any of the private defendants knew of or in any way solicited Lawley's opinion concerning the lapse of Westborough Mall's zoning. Plaintiffs' inability to execute the development of Westborough Mall

can most certainly be traced to their inability to attract major financial backing or raise the interest of even one major anchor tenant. Westborough Mall's own financial agent, Charles Green, testified that more than Sixteen Million Dollars ($16,000,000) would be necessary to build the Mall, and that the group had never so much as filed a loan application due to its inability to attract major tenants. By April, 1979 Westborough Mall owed Penzel Construction Company over $300,000. Carl Penzel testified that his company refused to build any structures until the grading bill was paid. Also Westborough Mall had no construction contracts let by April, 1979, nor had building plans been drawn up, and no evidence indicates that Staples and his group had in its employ anyone capable of doing so. It is therefore clear to this Court that the Westborough Mall was in the severe administrative and financial difficulty which assured its demise long before the difficulties arose which allegedly were experienced due to the acts of the defendants.

After extensive discovery in this cause including the depositions of Lawley, the City Engineer, and all the Councilmen defendants, plaintiffs have been unable to unearth a shred of evidence linking an improper act of the City defendants to the private developers' efforts to build West Park Mall. Also no evidence of a link between the acts of either group to damages suffered by plaintiffs has been established.

The allegation that the May and Drury defendants deprived plaintiffs of due process and equal protection rights by obtaining C-4 commercial zoning for West Park Mall meets its demise when viewed in light of the decision of the Eighth Circuit Court of Appeals in *Gorman Towers, Inc.* v. *Bogoslavsky,* 626 F.2d 607 (8th Cir. 1980). *Gorman Towers* dealt with a suit against various public officials, landowners and a landowner's attorney all of whom allegedly conspired to rezone a portion of real estate from multiple to single family dwellings thereby depriving

the developers of equal protection under the Fourteenth Amendment. The Eighth Circuit held in part that the private citizens and their attorney who sought the change in zoning were absolutely privileged by the First Amendment in their successful attempts to persuade the city officials of Fort Smith, Arkansas to downzone the property involved and thereby effectively kill a proposed apartment complex. The active opponents of the housing project pressed upon the Eighth Circuit a theory of derivative immunity protecting the individual defendants—that immunity derived from the absolute immunity enjoyed by the city officials, *see Harley* v. *Oliver,* 404 F.Supp. 450, 454 (W.D. Ark. 1975), *aff'd* on other grounds, 539 F.2d 1143, 1145-46 (8th Cir. 1976), and also on a general grounds of insufficiency of the pleadings, but the Court failed to reach these issues "...for we adopt the district court's holding that the private citizens and their lawyer were absolutely privileged by the First Amendment to petition for the zoning amendment that caused plaintiff's damages." *Gorman Towers* at 614. The City and the Councilmen defendants enjoy an absolute federal common law immunity from suit under 28 U.S.C. § 1983 for the Eighth Circuit in *Gorman Towers* held the absolute immunity enjoyed by state and regional legislators under *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979) extended to local legislators. *Gorman Towers* at 612, 613.

Plaintiffs' claim of deprivation of equal protection flies in the face of the facts surrounding the consideration by the Cape Girardeau City Council and the Cape Girardeau Planning and Zoning Commission of Ordinances 1437 and 1469 (C-2 and C-4 zoning for West Park Mall) in that the Westborough Mall developers had every opportunity to oppose West Park Mall's petitions for rezoning and indeed exercised every such opportunity with vigor. After the Westborough group exhausted the legitimate political means by which they could contest the rezoning, and all concerned parties were heard, the City Council

voted to grant West Park Mall the same competitive opportunity which Westborough had enjoyed for many years, that is C-4 zoning. Any causal link between the failure of the Westborough Mall project and the West Park Mall rezoning is simply nonexistent. The Westborough group had better than six years to secure financing, attract major tenants and provide for the construction of their project prior to the West Park rezoning, but none of these essential elements of the success of a modern shopping mall had been secured. It is therefore proper that summary judgment be granted on Count 2 of plaintiffs' complaint.

Plaintiffs have further alleged that these private defendants have conspired to restrain trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1 in Count 3; conspiracy to monopolize the regional shopping center marketing in the Cape Girardeau, Missouri metropolitan area in contravention of § 2 of the Sherman Act, 15 U.S.C. § 2 in Count 4; and further in Count 6 a violation of the aforementioned statute in a creation of a monopoly in the operation of a regional shopping center in Cape Girardeau.

Having recognized above that there exists a total lack of evidence linking any acts committed by defendants to any of the statements by Lawley concerning the downzoning of the Westborough Mall tract, and Staples' total lack of concern about such statements as well as the questionable effect or validity of such statements, plaintiffs' claim boils down to its illegal monopoly creation. This Court further reasons that this claim must fail since imposing liability on private parties in this instance would undermine their right to petition their legislature for favorable legislation. This right has been refined and secured by the Supreme Court in their adoption of Noerr-Pennington doctrine in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mineworkers of America* v. *Pennington*, 381 U.S. 657 (1965).

This immunity protects even persons having anti-competitive intent in seeking to effectuate legislation favoring their own economic interests. Further, although the plaintiffs claim to have been subjected to prejudicial or unreasonable legislative acts, the facts indicate that the Board of Zoning Commissioners and the City Council merely voted to extend the same zoning opportunities to West Park Mall previously enjoyed by the Westborough Mall project. The decisions were based upon the substantiated view that the West Park group was simply better organized, financed, and could more readily deliver on its promise to build a regional shopping mall in Cape Girardeau if given an opportunity. Therefore, the acts of these defendants in seeking to obtain through the legislative process an equal opportunity to that which the Westborough developers had long enjoyed are not within the scope of the antitrust laws. Finally, in *Parker* v. *Brown,* 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act does not bind the states and in no way restrains state acts such as the passage of the ordinances challenged herein. Even a pure monopoly—if a competition between one firm and another for the placement of a regional shopping mall in a specific area can be labeled the establishment of the monopoly—is immunized if the monopoly is established under state law. *Ladue Local Lines, Inc.* v. *Bi-State Development Agency,* 433 F.2d 131 (8th Cir. 1970). *See also California Retail Liquor Dealers Association* v. *MidCal Aluminum, Inc.,* 445 U.S. 97 (1980).

Pursuant to the guidelines established in the *California Retail* case, the state action immunity clearly extends to the zoning or rezoning powers of the municipalities in Missouri, *See State of Missouri ex rel Ellis* v. *Liddle,* 520 S.W.2d 644 (Mo. App. 1975), § 89.020 et seq. RSMo 1978. This Court would question the validity of plaintiffs' argument that this case even concerns a "monopoly" under the antitrust laws. When it is axiomatic to all parties involved that only one enterprise can succeed in a cer-

tain area due to natural market conditions, costs of production, and total dollar demand, it can hardly be said that the success of one enterprise bestows upon the other a cause of action in antitrust. This limitation is brought to bear even more heavily in this case where the private defendants sought only the same competitive environment—that is the same zoning—as the plaintiffs had enjoyed for some five years.

The competition which took place between the plaintiffs and defendants occurred before an open legislative body which afforded both parties full rights to express themselves in public hearings and legitimately determined to give both parties equal access to the relevant shopping center market. *See Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied* 436 U.S. 956 (1978). In sum, there exists no evidence of anti-competitive conduct by the defendants and therefore as a matter of law plaintiffs' monopoly claims must fail.

Plaintiffs Count 5 alleges a conspiracy to interfere with plaintiffs' valid business relationships and expectancies. Plaintiffs set out the persons with whom these relationships were enjoyed as only the (potential) tenants of Westborough Mall and "others". In outlining the elements of the tort of intentional interference in business relationships in *Salomon* v. *Crown Life Ins. Co.*, 536 F.2d 1233 (8th Cir. 1976), the Eighth Circuit held that the defendants' behavior in the potential interference must be without justification. Cases interpreting this requirement including *Salomon* specify that actions taken in defendants' own economic interest—absent some wrongdoing—cannot constitute a tortious interference. This requirement clearly provides for the inevitable conflicts inherent in the free enterprise system. *See Francis Chevrolet Co.* v. *General Motors Corp.*, 602 F.2d 227 (8th Cir. 1979). The efforts of the West Park group to build a shopping mall were justifiable as being legitimate business activity and not predatory or directly destructive of the

Westborough plan. This Court further notes that its finding that the Westborough Mall project failed not due to the acts of defendants but rather due to the legitimate competitive successes of the West Park group and the inability of plaintiffs to execute its own business undertaking, Count 5 must also fail as a matter of law.

Plaintiffs' amended complaint Count 7 alleges that ordinances 1437 and 1469 are void for various reasons. The Missouri Court of Appeals in *Schmitt* v. *City of Hazelwood,* 487 S.W. 2d 882 (Mo. App. 1972) faced a similar question to the issue herein when it decided whether the operator of a car wash had standing to challenge a special use permit granted by the city to allow a competitor to also operate a car wash. The court reasoned that "they (zoning ordinances) promulgate a scheme of development and the municipality and preserve the character of the neighborhoods and the interest of the public in general.", *Schmitt* at 888, and upheld the dismissal of the plaintiff's complaint. The Cape Girardeau Zoning Commission determined that the effect of the zoning of West Park would not be detrimental to the public health, safety and morals or general welfare of the community, the scheme of development of the community, or threaten the preservation of the character of the surrounding neighborhood contrary to the public interest. As the Court noted in *Schmitt* at 888 "comprehensive zoning ordinances are not intended to confer business monopolies on individuals". This is precisely what Westborough Mall seeks to effectuate by attack on ordinances 1437 and 1469, and since competitive disadvantage flowing from a zoning ordinance is not the particular interest which gives rise to standing on behalf of the disadvantaged firm to challenge that zoning, Count 7 must fail as a matter of law. *See also Palmer* v. *St. Louis County,* 591 S.W.2d 39 (Mo. App. 1979).

A review of the exhibits and documents defendants put forth which were reviewed by the City Planning and Zoning Commis-

sion when considering these two requests, fully indicates that in the course of the hearings held and the presentations made by all concerned parties, the zoning requests were reviewed in detail and thoroughly scrutinized. There exists no evidence that any city official acted with a disregard for the public welfare, in an arbitrary or capricious manner, or in any way advancing their own personal interests. It cannot be said that these legislative acts clearly were not even fairly debatable or that an abuse of discretion occurred beyond a reasonable doubt. *See Tealin Company* v. *City of Ladue,* 541 S.W.2d 544 (Mo. banc 1976) and *Kellogg* v. *Joint Counsel of Women's Auxiliaries Welfare Assn.,* 265 S.W.2d 374 (Mo. 1954).

Plaintiffs object to the West Park zoning in that it contradicts a 1977 'comprehensive plan' for zoning for the City of Cape Girardeau, that there would exist an adverse impact on traffic and drainage in the surrounding area, that the passage of the ordinance would affect the value of certain property in the City, that the ordinance would constitute spot zoning, and that defendants were part of a larger illegal scheme or conspiracy. This Court notes that based upon the deposition testimony submitted to this Court it is certain that the 'comprehensive plan' has never been adopted by the City and therefore is not binding upon it. Further, the plan is expressed in terms of goals and options for future development and is not in itself a zoning code which would bind the Council when faced with the West Park Mall zoning applications. There is no evidence that the traffic and drainage problems which would allegedly arise from the rezoning would have actually taken place. The decrease in the value of other land is not a proper or sufficient grounds with which to overturn a rezoning decision of a city. *Treme* v. *St. Louis County,* 609 S.W.2d 706, 714 (Mo. App. 1980).

Equally frail is plaintiff's argument that these ordinances constitute spot zoning. The application of West Park Mall and the zoning of the surrounding areas indicate that the C-2 and

C-4 zoning for the tract did not constitute "unique treatment contrary to like property in the same general location", *Wheeler* v. *City of Berkeley,* 485 S.W.2d 707, 711 (Mo App. 1972). By its very nature, all zoning will render a particular parcel distinctive from surrounding land in terms of its permissible use. But it can in no way be said that the C-2 and C-4 zoning for the West Park Mall project was out of line with surrounding lands. In fact, plaintiff's argument that this particular tract zoning constituted spot zoning would be equally applicable to its own site which enjoyed C-4 zoning since 1974 and was less than a mile away.

With regards to plaintiffs' allegation that the rezoning ordinances were part of a larger illegal scheme as alleged in previous counts is fatally defective in that after voluminous discovery being had, there exists no evidence of any such illegal scheme.

Lastly, plaintiffs' claims of a denial of due process or a deprivation of equal protection of the law are not valid grounds for enjoining the zoning ordinances since these claims legitimately arise only if these zoning ordinances do not bear a "substantial relation to the public help, safety, morals, or general welfare". *Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365, 387 (1926). Since zoning is rationally related to a legitimate state interest and the two contested ordinances are not irrational either in their distinction between the West Park site and other sites nor in its application to the Westborough Mall and West Park Mall projects, plaintiffs' equal protection and substantive due process claims must also fail as a matter of law. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955)

For the above stated reasons, it is proper that summary judgment be entered on plaintiffs' seven count complaint.

Dated this 27th day of October, 1981.

/s/ H. Kenneth Wangelin
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2314

September Term, 1982

Westborough Mall, Inc., a Corporation, George Staples, Jr., and Westborough Mall Associates, a Missouri Limited Partnership, by and through George Staples, Jr., its sole general partner,

Appellants,

vs.

City of Cape Girardeau, Missouri, a Municipal Corporation, Paul W. Stehr, Robert K. Herbst, Howard C. Tooke, Samuel L. Gill, Gail L. Woodfin, W. G. Lawley, Charles L. Drury, Drury Industries, Inc., a Corporation, May Department Stores Co., a Corporation, West Park Associates, a Missouri Limited Partnership, May Centers of Cape, Inc., a Corporation, and May Centers, Inc., a Corporation,

Appellees.

JUDGMENT

(Filed November 12, 1982)

This appeal from the United States District Court for the Eastern District of Missouri was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, reversed in part and affirmed in part.

It is further ordered that this cause is remanded to the said District Court for proceedings consistent with this Court's opinion.

November 12, 1982

Order entered in accordance with opinion:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, 8th Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-2314

September Term 1982

Westborough Mall, Inc., etc., et al,
Appellants,

vs.

City of Cape Girardeau, Missouri, etc., et al,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

It is here ordered by the Court that the attached revised page 27 modifying opinion should be substituted for previous page 27 filed in this Court's opinion on November 12, 1982.

It is further ordered that petition for rehearing and petition for rehearing en banc be and is hereby denied.

January 17, 1983

A True Copy:

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

competition. Thus, we affirm the district court's grant of summary judgment in favor of all defendants on Count 7 of plaintiffs' complaint.[8] Because we agree that the plaintiffs lack standing under current state law, we need not consider the district court's rulings on the substantive issues raised by the plaintiffs.

IV.

In conclusion, we reverse the district court's grant of summary judgment in favor of the city and the private defendants on Counts 1 through 6 of plaintiffs' complaint.[9] The district court, in holding that the plaintiffs were not entitled to judgment on these claims as a matter of law, weighed the evidence presented without giving the plaintiffs the benefit of the reasonable inferences that could be made from the facts presented; genuine issues of material fact preclude summary disposal of these counts. The district court correctly held that the plaintiffs lack standing to challenge the West Park Mall rezoning under current state law and we, therefore, affirm the grant of summary judgment in favor of all defendants on Count 7 of plaintiffs' complaint.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[8] It has been suggested that Missouri law on the issue of standing may be undergoing some change. If any such change occurs prior to the entry of final judgment by the district court, the court is free to reconsider its decision that plaintiffs lack standing in view of the new developments in state law.

[9] We affirm the district court's grant of summary judgment in favor of the individual city officials. *See Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 613-614 (8th Cir. 1980).

APPENDIX D

U.S. Const. amend. I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ...."

15 U.S.C. § 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Federal Rule of Civil Procedure 56(e):

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred in an affidavit shall be attached thereto or served therewith."

Office-Supreme Court, U.S.
FILED
MAY 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1642

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CHARLES L. DRURY, DRURY INDUSTRIES, INC., THE MAY DEPARTMENT STORES COMPANY, WEST PARK ASSOCIATES, MAY CENTERS OF CAPE, INC., MAY CENTERS, INC., and the CITY OF CAPE GIRARDEAU, MISSOURI,

Petitioners,

v.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR., and WESTBOROUGH MALL ASSOCIATES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-1642

CHARLES L. DRURY, DRURY INDUSTRIES, INC., THE MAY DEPARTMENT STORES COMPANY, WEST PARK ASSOCIATES, MAY CENTERS OF CAPE, INC., MAY CENTERS, INC., and the CITY OF CAPE GIRARDEAU, MISSOURI,

Petitioners,

v.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR., and WESTBOROUGH MALL ASSOCIATES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The judgment of the Eighth Circuit which petitioners seek to have overturned merely reverses a summary judgment entered by the District Court on a record abundant with evidence from which inferences and conclusions in favor of Plaintiffs could be drawn. The Court of Appeals neither departed from well settled standards of review

approved by this Court nor announced new legal principles. Such a judgment presents no question deserving of review by this Court.

Petitioners have urged this Court to review the evidence on the record to determine whether summary judgment in their favor should have been allowed to stand. They do so by presenting three questions, each of which is hypothetical and requires resolution in their favor of controverted facts and conflicting inferences. Their statement of the case portrays their embellished treatment of the record; however, the evidence is more fairly presented in the opinion of the Court of Appeals than in the petition.

Petitioners seek to create questions of importance by ignoring the basic character of this case, a factual dispute for which summary judgment is inappropriate. The Court of Appeals held that the District Court erred in its judgment because it made "a choice of inferences to be drawn from the subsidiary facts," *United States* v. *Diebold*, 369 U.S. 654, 655 (1962), "a choice which is impermissible on a motion for summary judgment." (A-14) Petitioners make the same error in their statment of the case and subsequent discussions of fact.

STATEMENT OF THE CASE

Petitioners' discussion of the history of Westborough Mall, respondents' development, reflects conclusions drawn from a biased opinion. They have drawn their inferences from the conflicting subsidiary facts, weighed evidence, questioned credibility, and have been extremely selective in what to present to this Court. The Court of Appeals properly concluded that a genuine factual issue existed as to the viability of respondents' mall. (A-14) Deposition

testimony and documents gave substantial support to the conclusion that respondents were unable to attract major tenants and to secure additional financing because the zoning had been illegally reverted in deliberate coincidence with the granting of the requested zone change to the competing West Park developers. (A-14)

Petitioners' discussion of the West Park Mall development is equally deceiving. It omits any reference to the preferential treatment afforded the West Park developers (A-17), to the numerous private meetings between the city officials and petitioners (A-17), to the assurances given months or years before any applications were even filed that zone changes would be granted (A-17 - A-18), and to the various anticompetitive, predatory tactics employed by the West Park developers to construct the sole regional shopping mall in the city. (A-21)

Finally, petitioners' portrayal of the reverter issue is characteristically misconceived. The analysis by the Court of Appeals as to the genuine issues of material fact found in the record is totally ignored. Petitioners neglected to present the facts which show that the acts taken by the city to deprive respondents of their C-4 planned commercial zoning for over a year and a half were pursuant to official policy. (A-13)

Instead, the record supports a finding that the city manager, after conferring with the city attorney, ordered the city engineer to alter the official zoning map of the city to reflect a reversion of respondents' zoning to prior (non-commercial) classifications. (A-12) The city manager, the chief executive officer of the city, also directed that no building permit be renewed or issued to respondents. These directions were carried out by the city engineer. (A-12) The city manager then informed city council in writ-

ing that respondents' zoning had been automatically reverted and that a reverter provision of the city would be applied to respondents' property unless and until the city manager was ordered otherwise by city council or a court. Council discussed the issue but took no action whatsoever, other than to disparage respondents and their zoning status to the news media. (A-9, A-12 - A-13) Thus virtually every city official was involved in the decision to automatically revert respondents' zoning without notice or a hearing.

The Court of Appeals recognized that these acts of the city officials "were not merely isolated incidents . . . but rather may have represented the official policy of the city concerning the status of plaintiffs' zoning." (A-13, citations omitted) Clearly, we do not have here a random, unauthorized deviation from procedure.

Petitioners also argue that the reversion of respondents' zoning had no effect on the development of respondents' mall even though the appellate court recognized that the reversion became a "cloud" on the zoning status of their property, as a result of which respondents were unable to attract major tenants or additional financing or even sell their leasehold. (A-14 - A-15)

This is clearly a case where summary judgment was reversed simply because there were genuine issues of material fact in the record; the writ should be denied.

REASONS FOR DENIAL OF WRIT

As is quite evident from petitioners' brief, the three questions presented for review all turn upon whether there was sufficient evidence in the record to withstand a motion for summary judgment. The Court of Appeals, after reviewing a three-volume appendix in excess of 900 pages, concluded that summary judgment was inappropriate because of the existence of genuine issues of material fact. (A-2 - A-3)

This Court has often recognized that a writ of certiorari should not be granted "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 164, 165 (1924), ("The argument developed that the controverted question was whether the evidence sufficed . . . primarily a question of fact;" writ dismissed as improvidently granted); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925), ("We do not grant a certiorari to review evidence and discuss specific facts"). Petitioners, however, are seeking just such an evidentiary review.

A second reason for denial of the writ is based upon the present procedural posture of this case. The Court of Appeals resolved none of the ultimate factual or legal questions but merely found that the record established genuine issues of material fact rendering summary judgment inappropriate. To reach this conclusion the Court properly applied the standard of review enunciated in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-89 (1968), (sufficient evidence of a factual dispute to require a resolution at trial of differing versions of the truth) and *Adickes* v. *S. H. Kress & Co.*, 398 U.S.

144, 152 (1970), (absence of genuine issue as to any material fact and evidence must be viewed in light most favorable to opposing party). See also *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

Finally, no "special and important reasons" single this case out from the myriad of petitions presented annually to this Court. The wrongdoings involved here were episodic and would not lead to a decision of precedential value to the public or legal community. Sup. Ct. R. 17; *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

A brief review of the facts and legal issues involved here establishes the absence of any question worthy of this Court's consideration.

There is evidence in the record of an unlawful conspiracy sufficient to withstand summary judgment.

Petitioners argue that the Court of Appeals found a genuine issue of material fact as to the existence of a conspiracy merely on the basis of evidence of an opportunity to conspire. This view of the appellate court's deciscion and the record is deceiving. The District Court concluded that respondents were "unable to unearth a shred of evidence" of conspiracy. (A-33) The Court of Appeals reviewed the entire record and reversed this erroneous conclusion, finding "sufficient evidence of a possible conspiracy to illegally revert plaintiffs' zoning to withstand a motion for summary judgment." (A-17) [1]

[1] Petitioners once again challenge documents relied upon below on the ground that they were improperly authenticated. Petitioners do not question the authenticity of the documents, only the method of

Contrary to petitioners' characterization of the appellate court's decision, evidence of more than a mere opportunity to conspire was looked for, and found, in the record. Summary judgment was deemed improper because the court found evidence of motive to conspire,[2] opportunity to conspire,[3] and overt acts consistent with the inference of a conspiracy.[4] There clearly is sufficient evidence of an

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authentication. The petitioners produced the exhibits in response to specific requests for production of documents; each exhibit, introduced by affidavit, was identified as to source. This is adequate evidence of authenticity, particularly when coupled with the nature and contents of the documents (e.g. some are signed or on letterheads while others are city ordinances or similar public documents). See e.g., *Alexander Dawson, Inc.* v. *N.L.R.B.*, 586 F.2d 1300 (9th Cir. 1978). Furthermore, statements made by defendants are excluded from the definition of hearsay (Fed. R. Evid. 801(d)) while business records are admissible as exceptions to the hearsay rule (Fed. R. Evid. 803 (6)). The Court of Appeals ruled that "the documents are sufficiently reliable for us to determine whether the record as a whole supports the District Court's decision in this case." (A-6) The District Court also ruled that it considered "all the evidence submitted". (A-6, A-32) Thus petitioners' attack on the evidence should once again be rejected.

[2] The West Park developers viewed respondents' project as a potential threat, particularly since the market could support only a single regional shopping center. (A-15, A-17) The city may have desired to get a particular department store, affiliated with petitioners, to come to the city but had been told it would only go to the West Park Mall; the city may have also been seeking a particular right-of-way owned by one of the West Park developers. (A-19)

[3] The Court focused upon the close relationship between petitioner Drury and city officials. (A-17) There were numerous private meetings between the West Park developers and city officials. After one such meeting the West Park developers were assured C-2 zoning while after a subsequent meeting a West Park developer wrote that they had gotten tacit city approval for the ultimately desired zoning in exchange for a right-of-way. (A-7, A-17 - A-18)

[4] One of the West Park developers edited the city manager's report to City Council (A-7 - A-8), deleting references to their fear of disruptive lawsuits which could be better handled after the C-4 zoning

illegal agreement to render summary judgment inappropriate (A-19 - A-20, A-24) and to meet the standard for proving conspiracy established in *American Tobacco Co.* v. *United States,* 328 U.S. 781, 810 (1946), and *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144, 152 (1970).

The record supports the conclusion that petitioners were not entitled to summary judgment on the basis of Noerr-Pennington immunity.

Petitioners argue that the Court of Appeals misconstrued and misapplied the *Noerr-Pennington*[5] doctrine so as to "scuttle" the immunity. To create this issue petitioners have taken the decision of the Court of Appeals out of context and mis-stated the facts in the record so as to distort the holding which was based on the unique facts of this case.

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was granted. The West Park developers sought "C-2 zoning per Lawley [City Manager] schedule" (A-7), and were generally afforded preferential treatment. (A-17) The notes of one of the petitioners evidenced their fear of respondents' progress, stating that "Staple - trouble - attack zoning" and "stop them from building so we maybe get a chance to build" (which, as the Court of Appeals noted, is what occurred just two months after the note was written). (A-8) The timing of the reverter itself, announced two days after the initial West Park zone change but two years after the time the automatic reverter would have gone into effect, also supports the inference of conspiracy (A-19), as does the fact that the City Manager informed the West Park developers within days of his official actions to revert respondent's property (and the impact on respondents so as to preclude development was noted) even though respondents were never notified by the city until the city manager wrote to respondents' financier three months later to tell him of the zone change. (A-9 - A-10)

[5] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965).

The Court of Appeals simply held that petitioners "*may* not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions." (A-22, emphasis supplied.) Citing its earlier decision in *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980), the Court noted that "actions beyond 'traditional political activity' may not be protected by the *Noerr* exemption." (A-22)

The Court, after discerning reliable evidence of conspiracy between the West Park developers and city officials, did not deprive petitioners of *Noerr* immunity merely on the basis of the participation of city officials in the conspiracy. Rather, the Court went further and also required proof of illegal or fraudulent acts, specifically finding evidence that the West Park developers "achieved their 'monopoly' through 'exclusionary, unfair, or predatory means.' " (A-21, fn 7, citations omitted) The Court focussed on the facts supporting an inference of an unlawful agreement to illegally revert respondents' zoning and recognized that the petitioners were not entitled to protection due to their involvement in what the court described as "a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property." (A-23)

This inquiry as to whether there was a "legitimate use of the political process" (A-22), is consistent with this Court's analysis in *Noerr*. There, anticompetitive motives and resulting restraints of trade were held not to be Sherman Act violations because "valid governmental action" was solicited. 365 U.S. at 136, 139. See also *U.S.* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533, 560 (1939), (otherwise valid act and order with monopolistic effect not violative of Sherman Act).

The Eighth Circuit's approach here fits precisely within the principles recognized in *Noerr*, 365 U.S. at 144, and in other cases such as *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). The Court of Appeals simply denied summary judgment based on *Noerr* because there was evidence of illegal acts to solicit unlawful, constitutionally infirm governmental action so as to directly injure respondents. Thus the Eighth Circuit decision is in no way at odds with *Noerr* or its progeny. The principle followed here is consistent with precedent and a workable, proper standard.

The Court of Appeals correctly found genuine issues of material fact as to the existence of constitutional deprivations.

Petitioners state that respondents' sole allegation of a 42 U.S.C. § 1983 civil rights violation was a deprivation of procedural due process and that there was neither a deprivation of property nor any lack of due process because respondents ignored state law post-deprivation options. Neither the District Court nor the Court of Appeals accepted petitioners' argument that no due process violation had been made out. (A-2) The argument certainly does not warrant the attention of this Court.

Petitioners rely on *Parratt* v. *Taylor*, 451 U.S. 527 (1981), to attack the Eighth Circuit's decision. In *Parratt*, this Court held that a random, unauthorized, tortious loss of property caused by the negligence of a state employee, for which a meaningful pre-deprivation hearing could not be provided, could be properly redressed through a State Court tort action. However, in *Parratt*, and again in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), this court has emphasized that the Fourteenth Amendment requires that there be an opportunity to be heard at a meaningful time and in a meaningful manner. In

Parratt, a post-deprivation remedy was sufficient; in *Logan* it was not. Obviously, the nature of the property interest and the circumstances of the deprivation are determinactive. *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex,* 442 U.S. 1, 12 (1979), ("It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands' . . . ." (citations omitted).[6]

In the case at hand, not only would a pre-deprivation hearing have been possible, practical, and meaningful, but one was in fact required by both the state zoning enabling legislation and the city's own zoning code (requiring notice and a hearing prior to any rezoning). In spite of these clear dictates, and respondents' specific exemption from the city's reverter provision, the city "automatically"

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[6] Respondents' property interests here are two-fold: (1) the right to maintain their zoning status unless and until changed in a lawful manner, with notice and a hearing; and (2) the right to develop and use their leasehold in a reasonable, feasible manner without losing the fair market value of the land. Both interests were pleaded and argued. (Paragraphs 14 and 15 of Amended Complaint. A-11 - A-15)

The circumstances surrounding the deprivation here are totally different from those in *Parratt.* Here, virtually every city official was involved in the decision to automatically, without notice or hearing, revert respondents' zoning. (A-12 - A-13) This was not a random, unauthorized, negligent act of a single city employee. As the Court of Appeals noted:

> "The actions by city officials in this case were not merely isolated incidents, . . . but rather may have represented the official policy of the city concerning the status of plaintiffs' zoning. . . ." (A-13, citations omitted)

Petitioners' reliance on *Greenholtz* is misplaced because the question there involved "purely subjective appraisals" as to the advisability of granting parole, 442 U.S. at 10, while the present matter concerns the need for "[p]rocedures designed to elicit specific facts," 442 U.S. at 14, that is, the inapplicability of the city's reverter provision, a purely objective question.

reverted respondents' zoning. Under these circumstances, where time was of the essence due to the fierce competition between respondents and petitioners, a state-law post-deprivation process could not satisfy the due process clause of the Fourteenth Amendment.[7]

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[7] Petitioners have mis-stated the record by arguing respondents used their due process claim as a means of "bootstrapping their way into the federal court under the Civil Rights Act." Actually, respondents filed this action in state court and later amended their petition to join civil rights with state tort claims when the later proved to be inadequate. At that time petitioners removed this case to federal court.

CONCLUSION

Petitioners have failed to present a question deserving of review by the Supreme Court of the United States. The Eighth Circuit Court of Appeals, applying traditional legal principles, simply reversed a summary judgment because the record contained genuine issues as to material facts. The writ of certiorari should be denied.

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